Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1996

LAWRENCE ROSANO,

Petitioner,

- v -

ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANCO and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), this Court granted a new trial because of the improper introduction of evidence of a defendant's past criminal record holding that cautionary instructions would not cure the error. Against this background, the first question presented here is:

   > Whether questioning by defense counsel, in violation of a pre-trial order not to mention the civil rights Petitioner's past misdemeanor criminal record and incarceration (which incarceration occurred *after* the 1986-1988 incidents at Adelphi University and which did not involve a felony nor *crimen falsi* misdemeanor conviction) and litigiousness, in the absence of any cautionary instruction by the trial court, did so taint the case by shifting the jury's focus from the worthiness of the Petitioner's claims to the moral worth of the Petitioner himself, that a new trial was required?

2. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970), this Court held that a private Defendant may be held liable as "a willful participant in joint activity with the State or its agents" (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)). Against this background, the second question presented is:

In the context of a 42 U.S.C. § 1983 claim by a civil rights Petitioner of joint action (excessive force) by a private Defendant and state actors (police), was it plain error for the trial court to give the following jury instruction: "Plaintiff must prove by a preponderance of the evidence that the [private] Defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law"?

3. The third question presented is:

Was it plain error for the trial court to give written copies of the jury instructions to the jury in this matter?

PARTIES

The Petitioner is as follows: Lawrence Rosano. The Petitioner was the Plaintiff in the district court and appellant in the court of appeals.

The Respondents were Defendants in the district court and Appellees in the Court of Appeals: Adelphi University, Joseph Crafa, Nicholas Manobianco, Chief of Security at Adelphi University and the Incorporated Village of Garden City (Garden City Police).

Numerous other Defendants were dismissed from the case pre-trial in the district court and were not Appellees in the Court of Appeals. The dismissed parties who did not take part in the appeal were: The County of Nassau, Nassau County Police Department, Officer Ted Sigwart, Officer Wayne Vogel, Officer K. Jackson, Officer G. Becket, Officer Schroeder, Sgt. Sullivan, Capt. Ginhardt, Officer Di Paulo, Officer Thorn, Officer Vincent Pantolillo, Officer Fitzpatrick, Board, Nassau County District Attorney Office, Denis Dillon, Margaret Hurst, Joy Watson, Judge Geoffrey O'Connell, Judge Jerome Medowar, Judge Mark Mogil, Nassau County District Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The unpublished post-trial decisions of the district court denying a new trial are found in Appendix D (A-16 to A-21) and Appendix E (A-22 to A-29). The unpublished decision of the Court of Appeals is found in Appendix A (A-1 to A-6). The Court of Appeals issued its decision on November 25, 1996. A motion for rehearing and suggestion for rehearing in banc was made by the Petitioner and was denied on February 14, 1997 (Appendix B, A-7 to A-8).

JURISDICTION

A trial to the jury was held on December 13, 1993, through December 16, 1993, ending in a verdict for the Respondent.

Motions for new trial were made by Petitioner with decisions being issued on June 28, 1994 (Appendix D, A-16 to A-21), and April 5, 1995 (Appendix E, A-22 to A-29), denying the Petitioner's motion for a new trial. The Court of Appeals issued its decision (A-1 to A-6) on November 25, 1996, affirming the district court, and denied a Petition for Rehearing on February 14, 1997 (A-7 to A-8). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner is an individual personally and morally opposed to abortion, who was falsely arrested and subjected to excessive force on numerous occasions for engaging in his right to speak freely at Adelphi University. He was arrested by the Respondent Garden City Police in cooperation with Respondent Adelphi University and its Dean of Students,

Respondent Joseph Crafa and its Chief of Security, Respondent Nicholas Manobianco. The gravamen of the Petitioner's civil rights claim was a joint action conspiracy under 42 U.S.C. § 1983 between the private actors (Adelphi University, Joseph Crafa, and its Chief of Security, Nicholas Manobianco) and the Garden City Police consisting of the use of excessive force during the arrest, including beating up and injuring the Petitioner on several occasions.

For the jury, the crux of the case was whether or not they would believe the civil rights Petitioner's version of events or the Respondents' denials. The Petitioner himself was the sole witness for Petitioner's case. The trial court in response to a motion in limine instructed the Respondents to make no reference to the Petitioner's unrelated misdemeanor arrest and incarceration, *which took place subsequent to the 1986-1988 events in question* and which did not involve a felony or a *crimen falsi* misdemeanor.

Despite the court's ruling regarding the improper and prejudicial nature of any reference to the Petitioner's *subsequent* misdemeanor arrest and incarceration on unrelated matters, one of the defense attorneys asked one of the Respondent's witnesses whether or not he was aware that the Petitioner had made similar claims of brutality against correctional officers. The civil rights Petitioner's counsel objected and the court struck the question from the record, but issued no cautionary instruction to the jury (Appendix F, A-30 to A-32). By referencing in the question not only the unrelated prior arrest and incarceration, but the Petitioner's litigiousness, the clear damage was already done impugning the moral character of the Petitioner in violation of the trial judge's prior ruling. As Justice Jackson stated so well in

Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790, 799 (1949) (concurring):

> The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, 68 S.Ct. 248, 257, 92 L.Ed. 154, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54.

Although asked by Petitioner's counsel, the district court failed to issue at the time of the error any cautionary instructions to the jury regarding this extremely prejudicial matter (Appendix F, A-32).

Furthermore, it was plain error for the trial court to issue a statement in its jury instructions that for a private actor to be found liable of a civil conspiracy with a state actor for purposes of 42 U.S.C. § 1983, that the private "Defendant [must have] exercised a power possessed by virtue of state law and was clothed with the authority of state law" (Appendix G, A-39). This instruction, while possibly appropriate for a suit solely against a state actor, was improper for a case based on a private actor being in a joint action conspiracy with police state actors for purposes of an excessive force claim.

To make matters worse, a copy of these improper jury instructions were given to the jury. This ground was raised in a post-trial motion of the Petitioner as a basis for a new trial and was denied by the trial court (Appendix D, A-18 to A-19) and affirmed on appeal by the Second Circuit (Appendix at A-6). As will be noted in the section entitled, "Reasons for Granting the Writ", a disturbing trend has developed in the lower courts

of the United States whereby giving written copies of jury instructions is becoming common, which of course can lead, as Wright & Miller suggest in their Federal Practice and Procedure Section 2555 (1991), to the potential danger where juries take instructions out of context, which appears to have been done in this case. The improper statement just mentioned regarding a private actor clearly could have been taken out of context by the jury and that is a further reason not to have given them written copies of the jury instructions.

STATEMENT OF FACTS

The gravamen of the Petitioner's claims was summarized by the district court when it rejected the defense motion for summary judgment as follows:

> Plaintiff was deposed for several days. The testimony that he provided forms the evidentiary basis for plaintiff's opposition to defendants' motion. *Plaintiff testified that, on May 1, 1986, defendant Manobianco punched him in the nose with his fist, causing plaintiff to bleed from his nose*; he apparently contends that the *Garden City Police failed to take any action* in response to his claim that excessive force was used by Mr. Manobianco. (Rosano Tr. pp. 722, 851). Plaintiff also testified that a captain of the Garden City Police took a picture of the blood flowing from Mr. Rosano's nose and informed plaintiff that he would give the photograph to plaintiff for proof of his condition but failed to do so. (Rosano Tr. p. 710). Plaintiff additionally testified that, *on August 26, 1986, four Adelphi security guards,*

including Mr. Manobianco, beat him severely. (Rosano Tr. pp. 757-764). He maintains that despite his battered condition, *when the Garden City Police arrived they twisted his arms and did not take plaintiff to a hospital.* After being released by the Garden City Police, plaintiff claims that he brought himself to the emergency room of Franklin General Hospital. (Rosano Tr. pp. 766, 770, 779). *Last, plaintiff testified that on May 3, 1987, he was approached in the Adelphi cafeteria by four or five members of the Garden City Police Department, and that they may have been accompanied by an Adelphi security employee.* He claims that he was *placed in a hammerlock* hold by one of the police officers "and lifted up very forcefully so my head was pointed down to the stone floor," giving plaintiff "*excruciating pain in my shoulder and my neck area.*" (Rosano Tr. pp. 868-870, 879-882. . . . *Plaintiff has testified that the Garden City Police showed indifference to his alleged beaten condition, inflicted by members of a private security force employed by an academic institution, by failing to investigate his claims of excessive force and by failing, in at least one instance, to take him to a hospital for treatment.* . . . Plaintiff has also testified that *the police failed to make photographic evidence available to him* which would have buttressed any claims that he might have had against Adelphi. Last, there is some evidence that *when plaintiff was allegedly*

> *beaten by the police in the cafeteria, this was in the presence of a member of the Adelphi security force.* The repeated nature of these incidents, and the alleged beating of plaintiff by the Garden City Police in defendant's presence, constitutes sufficient evidence from which a trier of fact might reasonably infer a concerted action (emphasis added).
>
> Memorandum and Order dated March 22, 1993, Appendix C at A-12 to A-14 (emphasis added).

REASONS FOR GRANTING THE WRIT

I. The admittedly improper and highly prejudicial question regarding the civil rights Petitioner's past misdemeanor criminal conviction, incarceration and past litigiousness not only violated the trial judge's specific pre-trial order not to attempt to introduce such evidence, but so improperly tainted the jury trial that a new trial was required in accordance with *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

The dispute over the improper question was described by the district judge in his post-trial memorandum denying the motion for new trial as follows:

> Plaintiff alleged violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University ("Adelphi") security force, conspired with members of the Village of Garden City Police

Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed plaintiff's claims against defendants Adelphi and Garden City. On December 16, 1993, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco. . . . In his only remaining claim for post-trial relief, plaintiff argues that the attorney for Garden City violated an instruction given by the Court that plaintiff's recent incarceration was not to be mentioned during trial. During her cross-examination of Dr. D'Alessandro, plaintiff's psychologist, counsel for Garden City asked the witness the following question:

> Did [Rosano] ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

Trial Transcript at 497 ("Tr.") [Appendix F, A-30]. Plaintiff's counsel immediately objected to the question and a sidebar conference ensued. Counsel for Garden City argued that the fact that plaintiff "told other people that he has been assaulted by other police officers in other police

departments in the same exact manner, that the correctional officers in East Meadow also put his ankles together," was relevant to impeach plaintiff's credibility. *Id.* Because the Court previously ruled that plaintiff's incarceration subsequent to the events that formed the basis for the claims being tried was not admissible, the Court struck counsel's question from the record. *Id.* at 498 [Appendix F, A-32]. The Court permitted counsel for Garden City to ask the question in a form that did not reveal that plaintiff had been incarcerated. Counsel rephrased the question to the witness as follows:

> At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

Id. at 498-99 [Appendix F, A-32]. Plaintiff argues in his post-trial motion that counsel's questions sufficiently prejudiced the jury to warrant granting him a new trial. . . . The initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial.

Memorandum and order dated April 5, 1995 (Appendix E at A-23 to A-26).

The district court here violated a long-standing position of this Court and lower federal courts that when credibility is a central issue, especially in a police brutality case where the civil rights Petitioner is his sole witness, improper questioning or evidence that a litigant has a non-felony criminal record (which is not *crimen falsi*) and has made prior claims (litigiousness) tends to shift the jury's focus from the worthiness of the litigant's claim to the moral worth of the litigant himself, especially when, as here, the incarceration and litigiousness occurred *after* the incidents that the plaintiff is complaining of in his lawsuit. What is particularly egregious here is that defense counsel violated the court's pre-trial instructions *not* to question in this area. Clearly, as can be seen from the colloquy during the side bar and subsequent "sanitized" question, the genie has clearly been let out of the bottle here, i.e., the idea has been planted in the mind of the jury that the Petitioner was incarcerated and had made prior claims - litigiousness - and any attempt to minimize that, particularly in the absence of a cautionary instruction, is futile. As Justice Jackson said so well:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, 68 S.Ct. 248, 257, 92 L.Ed. 154, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 2 Cir., 167 F.2d 54." *Krulewitch*, 336 U.S. at 453, 69 S.Ct. at 723 (concurring).

The improper question and its sanitized version clearly shifted the focus of the jury from the Petitioner's claim of police brutality to his *subsequent* past criminal record and

litigiousness. As is in the case of *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), this Court has traditionally held that the improper question or introduction of evidence of a defendant's prior non-felony criminal record can constitute prejudicial error beyond the capacity of cautionary instructions to cure.

Here, there were no cautionary instructions, despite the request of Petitioner's counsel, although the question was struck from the record (Appendix F, A-32). The idea was planted in the jury's mind of past criminal record, incarceration and litigiousness and no attempt was even made by the trial court to instruct the jury not to consider it *at the time the error was made*, despite requests by Petitioner's counsel. Therefore, the error was not harmless. Clearly, this question and the resulting impression to the jury that the Respondent was a criminal who had been incarcerated and had made prior claims was not, "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991).

As has been said by the Second Circuit itself, "One indicator of the evidence as degree of importance is whether or not the evidence bears on an issue that is plainly critical to the jury's decision." *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d. Cir. 1996). The trial judge here had already ruled pre-trial that any evidence of Petitioner's unrelated post-event misdemeanor conviction and incarceration was wholly improper and would not be allowed (Appendix E, A-24 n.3). However, the trial court failed to uphold its earlier correct ruling when it failed to grant a new trial when the defense counsel transgressed this area.

This Court knows well that the gravamen of any claim of excessive force is the credibility of the civil rights Petitioner, especially when the Petitioner has no other witnesses to the events. Here, the Petitioner's credibility was unjustly compromised by the double improper suggestion that he had been incarcerated and was litigious. This suggestion was so prejudicial that it tainted the jury process and made the jury focus on the moral worth of the Petitioner rather than his claims. As such, a new trial is required.

As the Court of Appeals has said:

> The charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent. See McCormick on Evidence Sec. 196 at 578-81 (3d ed. 1984); 3A J. Wigmore, Evidence Secs. 963, 981 (Chadbourn rev. 1970). . . . [A plaintiff's] litigiousness may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant. The trial court has a duty to prevent exploitation of this prejudice.
>
> *Outley v. City of New York*, 837 F.2d 587, 592 (2d. Cir. 1988) (quotations and citations omitted).

The said improper question not only implicated the Petitioner's post-event unrelated non-felony criminal record and incarceration, but combined it with a charge of litigiousness.

This case is similar to the *Marshall* case where this Court said:

> The trial judge, stating that he felt there was no prejudice to the Petitioner, denied the motion for mistrial. The trial judge has a large discretion in ruling on the issue of prejudice. . . . Generalizations beyond that statement are not profitable because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the Defendant is almost certain to be as great when that evidence reaches the jury . . . not tempered by protective procedures.

Marshall, 360 U.S. at 313.

This Court should come to the same conclusion it did in the *Marshall* case when it stated, "We think a new trial should be granted." *Marshall*, 360 U.S. at 313.

II. The Jury Instructions regarding the elements required to prove a joint action conspiracy between a private Defendant and state actors (police) improperly required the civil rights Petitioner to prove that the private Defendant was clothed with state authority in violation of this Court's jurisprudence in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The civil rights Petitioner in the case at bar charged and testified that Respondent Adelphi University and its Chief of

Security, Respondent Nicholas Manobianco, were in a joint action conspiracy with the Respondent police of the Village of Garden City to have him falsely arrested and use excessive force in the arrest in violation of 42 U.S.C. § 1983. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970), this Court held that a private Defendant may be held liable as "a willful participant in joint activity with the State or its agents" (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)). In the context of a 42 U.S.C. § 1983 claim of joint action by a private Defendant and state actors, it was plain error for the trial court to give the following jury instruction: "Plaintiff must prove by a preponderance of the evidence that the [private] Defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law".

This instruction improperly denies the Petitioner the due process of law and is plain error, as it requires a civil rights Petitioner to prove that a private Defendant *is* a state actor rather than *in a joint action conspiracy with* a state actor (the police), when false arrests accompanied by police brutality occur.

III. A disturbing trend is developing in the lower federal courts where judges are allowing written questions jury instructions to be given to the jury which has the danger of causing the jury to focus on particular statements out of context.

The Petitioner, in his post-trial motion for new trial, raised the ground that the jury should not have been given a copy of the court's instructions. The Second Circuit disagreed stating:

> Rosano argued in his post-trial motion, and now argues on appeal, that the district court erred in providing the jury with a written copy of its instructions for use during deliberations.
>
> (Second Circuit Summary Order, Appendix A, A-6).

While the Petitioner, "[F]ailed to object to the delivery of a written copy of the instructions at the time the copy was provided" (Second Circuit Summary Order, Appendix at A-6), it is clearly plain error for the trial court to do so. The trial court acknowledged that in Wright & Miller, Federal Practice and Procedure Section 2555 (1991), the authors suggest it is improper to give the jury a written copy of the instructions because the authors contend that juries may take a portion of the instruction out of context. This disturbing trend in the lower federal courts has been validated by the First[1], Second[2], Sixth[3], Seventh[4] and Eighth[5] Circuits. This Court must intervene to correct this improper and prejudicial practice.

---

1 *United States v. Parent*, 954 F.2d 23, 25 (1st Cir. 1992).

2 The case at bar.

3 *United States v. Blane*, 375 F.2d 249 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967).

4 *United States v. Clavey*, 565 F.2d 111 (7th Cir. 1977), *modified on other grounds*, 578 F.2d 1219 (7th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978).

5 *Stineman v. Fontbonne College*, 664 F.2d 1082 (8th Cir. 1981).

CONCLUSION

For the foregoing reasons, the Petitioner is entitled to a new trial for his civil rights claim under 42 U.S.C. § 1983 against Respondents Adelphi University, its Dean of Students, Joseph Crafa, its Chief of Security, Nicholas Manobianco, and the Incorporated Village of Garden City (Garden City Police) and prays from this Court that the judgment of the Second Circuit be vacated and reversed in a summary fashion as this Court did in *Marshall v. United States*, or that it be vacated and remanded for further proceedings after plenary consideration by this Court.

Respectfully submitted,

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Dated: New Milford, CT
May 15, 1997

APPENDICES

APPENDIX A
SUMMARY ORDER

EDNY
87-cv-876
Amon, DJ

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 25th day of November, one thousand nine hundred and ninety-six.

PRESENT: HON. WILFRED FEINBERG
HON. ROGER J. MINER
HON. FRED I. PARKER,
Circuit Judges

/Seal/Filed Nov. 25, 1996

LAWRENCE R. ROSANO,
Plaintiff-Appellant,

v.

95-6250

ADELPHI UNIVERSITY; JOSEPH CRAFA, Dean of Students of Adelphi University; NICHOLAS MANOBIANCO, Adelphi University Security; INCORPORATED VILLAGE OF GARDEN CITY; GARDEN CITY POLICE; THE COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT; OFFICER TED SIGWART, Badge No. 108, of Garden City; OFFICER WAYNE VOGEL, Badge No. 117, of Garden City; OFFICER K. JACKSON, Badge No. 150, of Garden City; OFFICER G. BECKETT, Badge No. 104, of Garden City; OFFICER SCHROEDER, Badge No. 154, of Garden City; SGT. SULLIVAN, Badge No. 33, of Garden City; CAPT. ;GINHARDT, of Garden City; OFFICER DIPAULO, Badge No. 37, of Garden City; OFFICER THORN, Badge No. 106, of Garden City; OFFICER VINCENT PANTOLILLO, Badge No. 139, of Garden City; OFFICER FITZPATRICK, Badge No. 32, of Garden City; BOARD; NASSAU COUNTY DISTRICT ATTORNEY OFFICE; DENIS DILLON, District Attorney of Nassau County; MARGARET HURST, Assist. District Attorney of Nassau County; JOY WATSON, Assist. District Attorney of Nassau County; JUDGE GEOFFREY O'CONNELL, of the Nassau County District Court; JUDGE JEROME MEDOWAR, of the Nassau County District Court; JUDGE MARK MOGIL, of the Nassau County District Court; NASSAU COUNTY DISTRICT COURT, First District,

Defendant-Appellees

Henry Wilson; Garland Mercer; Richard Marston; Glen Ursher; Andrew Davis; Edwin Miller and Thomas Cox,
Defendants.

APPEARING FOR APPELLANT:

Lawrence R. Rosano, *pro se,*
Elmont, NY.

APPEARING FOR APPELLEES
ADELPHI UNIVERSITY, JOSEPH CRAFA,
AND NICHOLAS MANOBIANCO:

Edward M. Fogarty, Fogarty & Fogarty,
Mineola, NY.

APPEARING FOR APPELLEE VILLAGE OF GARDEN CITY:

Nancy Cifone, Corrado & Cifone,
Great Neck, NY.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and hereby is AFFIRMED.

This cause came on to be heard on the transcript of record and was argued.

Plaintiff-appellant Lawrence R. Rosano appeals *pro se* from a judgment entered in the United States District Court for the Eastern District of New York (Amon, J.) after a jury trial, and from an order denying a motion for a new trial.

Rosano at one time was employed by the United States Navy as a civilian engineer. Upon dismissal from the Navy,

Rosano brought six lawsuits against the United States, each of which was decided against him. While these suits were in the appeal process, Rosano entered a paralegal training program at defendant-appellee Adelphi University. Once his student status expired, Rosano continued using the library and word processing facilities at Adelphi in pursuit of his several legal actions before various federal courts.

In March of 1986, Rosano was detained by Adelphi security officers on a charge of harassing some Adelphi students. As a result of this charge, Rosano was issued a persona non grata letter, which prohibited him from being on Adelphi property. On seven separate occasions, Rosano was found on campus by Adelphi security officers. He was detained, removed and charged with trespass on each occasion. One of the reasons advanced by Rosano for being on campus was that he needed to use the law library to pursue federal court actions raising constitutional challenges to abortion and contraception. He subsequently was convicted on seven trespass violations.

On March 20, 1987, Rosano filed a complaint in the district court. The complaint, as twice amended thereafter, included various causes of action relating to Rosano's arrests for trespassing, including several constitutional claims and claims of a conspiracy between Adelphi security officers and the Garden City police to use excessive force in effecting four of the arrests. The original complaint named some 31 defendants. After numerous dismissal motions were granted, the list of defendants was reduced to three—Adelphi, defendant-appellee Nicholas Manobianco, who was Adelphi's Director of Safety and Security, and defendant-appellee Garden City, New York. The case went to trial on December 13, 1993. On December 15th, the district court

dismissed the action with respect to Adelphi and Garden City. On December 16th, the jury returned a verdict for Manobianco. Rosano moved for a new trial, and the district court denied the motion. On appeal, Rosano advances a number of arguments.

Rosano claims that he should have been granted a new trial because Garden City's attorney asked an improper question relating to his incarceration. We disagree. Although an improper question was asked, the district court minimized the prejudicial effect of the question by immediately ordering the question struck from the record. Thus, the challenged statement does not provide a basis for disturbing the jury verdict. *See Smith v. Lightning Bolt Prod., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988).

Rosano also contends that the district court erred in holding that he had forfeited his challenge to the acting under color of state law jury instruction. We have held that "[a]bsent objection, an error [in the jury instructions] may be pursued on appeal only if it is 'plain error' that may result in a miscarriage of justice, or in 'obvious instances of . . . misapplied law.' " *Metromedia v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992) (quotation omitted), *cert. denied*, 508 U.S. 952 (1993). In the present case, there was no plain error or misapplication of law. In fact, the jury instruction set forth the proper standard for finding liability on the part of a private actor acting in concert with state officials. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150-52 (1970). Therefore, we reject this claim.

With respect to Rosano's constitutional claims against the Adelphi defendants, the district court properly held that these claims, except as to conspiracy, must fail because the defendants are not state actors. *See e.g., Flagg Bros., Inc. v.*

Brooks, 436 U.S. 149, 156-57 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). As to the conspiracy claims, private parties cannot be liable under 42 U.S.C. § 1983 unless they conspire with a person acting under color of state law to deprive the plaintiff of a constitutional right. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996). However, Rosano had no constitutional right to be on the property of Adelphi, a private university. Accordingly, the district court prior to trial properly dismissed all of Rosano's claims, except the claim that the Adelphi defendants conspired with state officials to use excessive force against him.

Rosano argued in his post-trial motion, and now argues on appeal, that the district court erred in providing the jury with a written copy of its instructions for use during deliberations. Our examination of the record reveals that this argument was not raised until the motion for a new trial was made, nearly one month after the jury reached its verdict. Because Rosano failed to object to the delivery of a written copy of the instructions at the time the copy was provided, we review for plain error. *See United States v. Delano*, 55 F.3d 720, 732 (2d Cir. 1995). We think that the delivery of written text to the jury was appropriate in this case and that Rosano "cannot demonstrate any error, let alone surmount the higher plain error standard." *Id.*

We have considered all the other arguments advanced by Rosano and find no merit in any of them.

/Signature/
HON. WILFRED FEINBERG, HON. ROGER J. MINER,
HON. FRED I. PARKER
Circuit Judges.

APPENDIX B
DENIAL OF REHEARING IN BANC
DATED FEBRUARY 14, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10097

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourteenth day of February one thousand nine hundred and ninety-seven.

/Seal/
Filed Feb. 14, 1997
Dkt No: 95-6250

Rosano

Appellant

v

Adelphi University

Appellee

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Lawrence R. Rosano,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
George Lange III, Clerk

By:
/signature/
Beth J. Meador,
Administrative Attorney

o ccc
bancdn_frm

APPENDIX C
MEMORANDUM AND ORDER DATED 3/22/93

United States District Court

EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
CV 87-0876

LAWRENCE ROSANO,

Plaintiff.

- against -

ADELPHI UNIVERSITY, et al.,

Defendants.

AMON, UNITED STATES DISTRICT JUDGE

Introduction

This Court has received Magistrate Judge David F. Jordan's Report and Recommendation in the above case. 28 U.S.C. § 636 (b) (1). In part II of the Report and Recommendation, Magistrate Judge Jordan recommends denial of the County of Nassau's motion for summary judgment of the cross-claim of the Village of Garden City. The report concludes that the County of Nassau's motion is moot because this Court, by Order dated May 15, 1992, dismissed the Village of Garden City's cross-claim. Having received no objections, the Court hereby adopts this portion of the Report and Recommendation as the opinion of this Court.

In part III of the Report and Recommendation, Magistrate Judge Jordan recommends dismissal of the defendants Nassau

County Police Department, Nassau County District Attorney's Office and eleven Village of Garden City policemen. Having received no objections, and having conducted a *de novo* review of the record, the Court hereby adopts this portion of the Report and Recommendation as the opinion of this Court.

The Court has received objections to part I of the Report and Recommendation, in which Magistrate Judge Jordan recommends denial of defendants Adelphi University and Nicholas Manobianco's motion for summary judgment. Having conducted a *de novo* review of the record, the Court reaches the same conclusion as did Magistrate Judge Jordan but for different reasons.

Magistrate Judge Jordan construed defendants' motion to argue that summary judgment should be granted because plaintiff had presented no direct evidence of a conspiracy. Magistrate Judge Jordan recommended that defendants' motion be denied because circumstantial evidence can be offered to prove concerted action and direct evidence is not required. He further concluded that defendants had not fairly raised the issue of whether plaintiff had presented sufficient circumstantial evidence in order to defeat summary judgment. The Court respectfully disagrees with this latter conclusion and finds that defendants did raise the issue of the adequacy of the entirety of plaintiff's evidence. Because the evidence that plaintiff has presented meets the threshold requirements, defendants' motion for summary judgment is denied.

Background

Plaintiff's claims stem from his seven arrests, and subsequent conviction, for criminal trespass for entering the Adelphi campus in violation of the terms of a *persona non*

grata letter that had been issued to him by defendant Adelphi University. By Memorandum and Order dated August 4, 1988, the Honorable Reena Raggi dismissed all of plaintiff's claims against all of the named defendants, with the following exception. She permitted plaintiff to amend his complaint to state a claim against Adelphi and Mr. Manobianco, a member of the Adelphi security force, "charging a conspiracy among Adelphi Security personnel and Garden City Police to use excessive force in effecting his arrests." August 4, 1988 Memorandum and Order at 12.

Plaintiff's Amended Complaint exceeded the boundaries delineated by Judge Raggi and so, by Order dated June 27, 1990, Judge Raggi adopted Magistrate Judge Jordan's Report and Recommendation which recommended dismissal of those claims presented in the Amended Complaint which had been dismissed earlier in Judge Raggi's August 4, 1988 Memorandum and Order. Plaintiff's only remaining claim is against Adelphi and Mr. Manobianco which alleges that they conspired with the Garden City Police to use excessive force against the plaintiff in violation of 42 U.S.C. § 1983. Defendants have now moved for summary judgment against that claim.

Discussion

Defendants seek summary judgment, contending that plaintiff has presented no evidence that defendants had an agreement with the Garden City Police to use excessive force on plaintiff. In order to prevail on their motion, defendants must demonstrate that there is no issue as to any material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This Court must view the evidence in the light

most favorable to the plaintiff, the nonmoving party. *Adickes v. S.H. Kress,* 398 U.S. 144, 157 (1970).

Application of this standard to this case requires a review of the evidence which plaintiff has submitted in support of his conspiracy allegations. Plaintiff was deposed for several days. The testimony that he provided forms the evidentiary basis for plaintiff's opposition to defendants' motion. Plaintiff testified that, on May 1, 1986, defendant Manobianco punched him in the nose with his fist, causing plaintiff to bleed from his nose; he apparently contends that the Garden City Police failed to take any action in response to his claim that excessive force was used by Mr. Manobianco. (Rosano Tr. pp. 722, 851). Plaintiff also testified that a captain of the Garden City Police took a picture of the blood flowing from Mr. Rosano's nose and informed plaintiff that he would give the photograph to plaintiff for proof of his condition but failed to do so. (Rosano Tr. p. 710).

Plaintiff additionally testified that, on August 26, 1986, four Adelphi security guards, including Mr. Manobianco, beat him severely. (Rosano Tr. pp. 757-764). He maintains that despite his battered condition, when the Garden City Police arrived they twisted his arms and did not take plaintiff to a hospital. After being released by the Garden City Police, plaintiff claims that he brought himself to the emergency room of Franklin General Hospital. (Rosano Tr. pp. 766, 770, 779). Last, plaintiff testified that on May 3, 1987, he was approached in the Adelphi cafeteria by four or five members of the Garden City Police Department, and that they may have been accompanied by an Adelphi security employee. He claims that he was placed in a hammerlock hold by one of the police officers "and lifted up very forcefully so my head was pointed down to the stone floor," giving plaintiff

"excruciating pain in my shoulder and my neck area," (Rosano Tr. pp. 868-870, 879-882).

This evidence is sufficient, although barely, to defeat defendants' motion. Defendants rely on *San Filippo v. U.S. Trust Co. Of New York, Inc.*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985), as support for their position that plaintiff's evidence fails to make out a conspiracy. In that case, the Second Circuit, reversing the district court, granted defendants' motion to dismiss plaintiff's § 1983 claim alleging a conspiracy between an Assistant District Attorney ("ADA") and the defendant to present false testimony against plaintiff. The Second Circuit noted that plaintiff's conspiracy allegations were "completely unsubstantiated," *Id.* At 256, and therefore "insufficient to state a valid claim for relief under § 1983, or, in the alternative, to defeat defendants' motion for summary judgment." *Id.* The evidence which plaintiff had presented in support of his claim merely showed that the ADA had met with the defendants prior to their grand jury testimony, an action entirely consistent with the innocent and routine preparation of evidence, *Id.* As a result, plaintiff failed to present "one shred of evidence in support of his conclusory assertion of conspiracy." *Id.*

In contrast to the situation presented in *San Filippo,* here plaintiff has sufficiently supported his claim by presenting facts from which a fact-finder might rationally infer the existence of a conspiracy. Plaintiff has testified that the Garden City Police showed indifference to his alleged beaten condition, inflicted by members of a private security force employed by an academic institution, by failing to investigate his claims of excessive force and by failing, in at least one instance, to take him to a hospital for treatment. *See e.g.*

Firman v. Abreu, 691 F. Supp. 811, 813-14 (S.D.N.Y. 1988) (denying summary judgment alleging conspiracy to bring criminal charges maliciously and without probable cause where facts existed from which fact finder could make rational inference of conspiracy).

Plaintiff has also testified that the police failed to make photographic evidence available to him which would have buttressed any claims that he might have had against Adelphi. Last, there is some evidence that when plaintiff was allegedly beaten by the police in the cafeteria, this was in the presence of a member of the Adelphi security force. The repeated nature of these incidents, and the alleged beating of plaintiff by the Garden City Police in defendant's presence, constitutes sufficient evidence from which a trier of fact might reasonably infer a concerted action. *See e.g. Adickes v. S. H. Kress and Co.*, 398 U.S. 160, 90 S.Ct. 1598, 1608-09 (1970) (possibility that police officer who arrested plaintiff for vagrancy was also present in store which discriminated against plaintiff, and possibility that the same police officer had an understanding with the store not to serve plaintiff, held sufficient to defeat defendant's motion for summary judgment); *Dwares v. The City of New York*, No. 92-7266, 1993 U.S. App. LEXIS 2004, __ F. 2d __ (2d Cir. February 5, 1993) (allegations that defendant officers told "skinheads" that officers would permit "skinheads" to assault demonstrators, that a "skinhead" reported this permission to a reporter, that a demonstrator was assaulted by "skinheads" in the presence of an officer, and that officers did not interfere with the assault or arrest the "skinheads," held to "easily" meet § 1983 conspiracy pleading requirements. *Id.* at *16). Moreover, while in *San Filippo* plaintiff had not presented any evidence that the testimony in furtherance of the alleged conspiracy which defendants

ultimately gave was false, id., here evidence exists that the force used against plaintiff was excessive. (*See e.g.* Rosano Tr. p. 772).

Conclusion

For the reasons set forth above, the Court adopts Part II and Part III of Magistrate Judge Jordan's Report and Recommendation. The Court does not adopt the reasoning of Part I of that Report and Recommendation insofar as it finds that defendants did not raise the issue of the sufficiency of plaintiff's evidence, although the Court reaches the same conclusion that was reached in the Report and Recommendation, and accordingly denies defendants' motion for summary judgment.

SO ORDERED.

Dated: Brooklyn, New York
March 22, 1993

/Signature/
Carol Bagley Amon
United States District Judge

APPENDIX D
MEMORANDUM AND ORDER DATED 6/28/93

United States District Court

EASTERN DISTRICT OF NEW YORK
MEMORANDUM AND ORDER
87 CV 0876

LAWRENCE ROSANO,

Plaintiff,

-against-

ADELPHI UNIVERSITY, and
NICHOLAS MANOBIANCO,

Defendants,

-against-

VILLAGE OF GARDEN CITY,

Third-party defendant.

AMON, U.S. DISTRICT JUDGE

Introduction

Plaintiff moves, pursuant to rule 59 (a) (1), for post-trial relief. Defendants Adelphi University and Nicholas Manobianco, together with third-party defendant Village of Garden City ("defendants"), oppose the motion. The motion is denied for the reasons that follow, with the exception of one issue which cannot yet be resolved.

Background

This action is what remains of a suit initiated seven years ago against at least thirty defendants. Plaintiff alleged

violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University ("Adelphi") security force, conspired with members of the Village of Garden City Police Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed defendants Adelphi and "Garden City". On December 16, 1994, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco.

The plaintiff moves for a new trial on several grounds. He alleges that the Court erred in allowing the jury to take a copy of its instructions into the jury room during deliberations. He also argues that the jury instructions were "weighted unconstitutionally for defendants, and against plaintiff." Pl.'s Rule 59 Mem. at 1. Next, the plaintiff suggests that a question posed by third-party defendant Garden City was prejudicial. Plaintiff also "seeks to vacate the prior, non-final orders of Judge Raggi dismissing plaintiff's claims of Justification, defending Unborn Human Life, and Justification, exercising his Federal First Amendment Right, against Adelphi University and the Garden City Police." *Id.* at 1-2. Finally, plaintiff objects to the dismissal of defendants Adelphi and Garden City.

Discussion

Timeliness

Defendants Adelphi and Manobianco argue that plaintiff's motion is untimely. Judgment was entered in this case on December 21, 1993. Excluding week-ends and legal holidays,

see Fed. R. Civ. P. 6, plaintiff's motion had to be filed on or before January 6, 1994. Because the motion was filed on January 6, 1994, it is timely.

Jury Instruction

Plaintiff argues that the jury should not have been given a copy of the Court's instructions. He apparently theorizes that the parties were deprived of an opportunity to participate in answering any questions the jury might have had. Pl.'s Rule 59 Mem. at 1. However, the cases upon which plaintiff relies deal with situations in which trial courts mis-handled notes from a deliberating jury. *See United States v. Parent,* 954 F.2d 23, 25 (1st Cir. 1992); *United States v Maraj,* 947 F.2d 520, 525 (1st Cir. 1991); *Jimenez v. Heyliger,* 792 F. Supp. 910 (D.P.R. 1992).

These cases do not stand for the proposition that it is improper to give a jury a copy of long and often complicated legal instructions. Indeed, in *Parent,* the First Circuit noted that "[a} judge may, but need not, give the jury a written copy of the complete charge at the outset of deliberations." *Parent,* 954 F.2d at 24, n. 1. Other circuits agree, *see, e.g., Stineman v. Fontbonne College,* 664F.2d 1082 (8th Cir. 1981); *United States v. Clavev,* 565 F.2d 111 (7th Cir. 1977), *modified on other grounds,* 578 F.2d 1219 (7th Cir. 1978), *cert. denied,* 439 U.S. 954 (1978); *United States v. Blane,* 375 F.2d 249 (6th Cir.), *cert. denied,* 389 U.S. 835 (1967), as do commentators, *see, e.g.,* Wright & Miller, Federal Practice and Procedure

§ 2555 (1971).[1] Giving the instructions to the jury for use in their deliberations was not error.

Jury Instructions

The plaintiff urges that the Court's "instructions should have been structured to follow the underlying principle of considering evidence for decision on the basis of 'One Man's Word Against Another's,' rather than putting more weight to quantity over quality" (emphasis original). Pl.'s Rule 59 Mem. at 5. This argument is based on plaintiff's perception that the defendants' witnesses were interested in the outcome of the trial because they were employed by the defendants. Therefore, Rosano theorizes, they were likely to lie. Consequently, in his view, the jury should have been instructed to focus on the quality of the testimony, rather than on the sheer number of witnesses. *Id.*

Plaintiff, who was represented by counsel at trial, did not object to the Court's instruction on credibility. His argument is therefore not preserved. Fed. R. Civ. P. 51. Furthermore, his contention is meritless. The Court gave an instruction on credibility which clearly instructed the jury that it was to determine, based on its members' judgment of each witness, the weight to which the testimony was entitled. Moreover, the Court gave an interested witness instruction. *See* Jury

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1 Plaintiff argues that Wright & Miller actually support his viewpoint because the authors note that juries may take a portion of the instruction out of context. Pl.'s Reply Mem. to Garden City, Suppl. 2. Rosano reads the commentators accurately, but ignores that the decision is one committed to the court's discretion. Wright & Miller, Federal Practice and Procedure § 2555 (1971).

Instruction at 5-7. The jury instruction was not incorrect; in any event, the argument is not preserved.

Prejudicial Question

Plaintiff also claims that the attorney for Garden City violated an instruction given by the Court. *See* Pl.'s Rule 59 Mem. at 6. Rosano argues that the Court directed defendants not to divulge that plaintiff had been incarcerated; plaintiff argues that the attorney for Garden City violated this instruction. Plaintiff has neither ordered the transcript nor provided the Court with specific references to citations. Resolution of this issue requires that the Court review the transcript. Plaintiff is directed to provide the transcript and specific citations in a submission to be made no later than July 15, 1994.

Justification Defense

Plaintiff asks the Court to reconsider a decision by United States District Judge Reena Raggi, to whom this case was previously assigned. Rosano suggests that the Court should, in its discretion, reconsider a decision made by Judge Raggi which, apparently, dismissed the affirmative defense of "justification." The Court declines to revisit issues resolved by Judge Raggi, and has, therefore, not considered the related arguments set forth in Plaintiff's Rule 59 Memorandum. Plaintiff is advised that the Court will not consider any additional submissions which raise the justification defenses.

Dismissal of Defendants Adelphi and Garden City

Finally, plaintiff complains about the court's dismissal of defendants Adelphi University and the Village of Garden City. As defendants point out, and plaintiff concedes, his

attorney not only did not object to the dismissals, he *agreed with* the Court's action. In any event, and for the reasons stated on the record, the dismissals were proper.

Lack of Context

Plaintiff claims, in his Reply Memorandum, that the jury must have been confused because it heard no testimony as to why plaintiff repeatedly returned to the campus of defendant Adelphi. Reply Mem. at 4. Plaintiff was, as mentioned earlier, represented by capable counsel. The jury heard as much background testimony as was permitted by the Federal Rules of Evidence and deemed appropriate by plaintiff's attorneys. No new trial is warranted on the ground that the jury performed its function in a vacuum.

Conclusion

For the stated reasons, the motion is denied on all grounds, except that decision is reserved as to the allegedly prejudicial question. Any submission by plaintiff is to be filed by July 15, 1994 and is to address only that point. Defendants are to seek leave of court before submitting any response.

SO ORDERED

Dated: Brooklyn, New York
June 28, 1994

/Signature/
Carol Bagley Amon
United States District Judge

APPENDIX E
MEMORANDUM AND ORDER DATED 4/5/95

United States District Court

EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
87-CV-0876 (CBA)

Stamp: PLEAD X

LAWRENCE ROSANO,

Plaintiff,

-against-

ADELPHI UNIVERSITY, and
NICHOLAS MANOBIANCO,

Defendants,

-against-

VILLAGE OF GARDEN CITY,

Third-party defendant.

AMON, U.S. DISTRICT JUDGE

Introduction

On June 28, 1994, this Court denied plaintiff's motion, pursuant to Rule 59(a) (1), for post-trial relief based upon

various grounds.[1] The Court, however, reserved decision on plaintiff's motion for a new trial based upon his claim that a question posed by counsel for third-party defendant Garden City was prejudicial. The Court ordered the plaintiff to provide the transcript and the specific citation to the alleged prejudicial question.[2] For the reasons that follow, plaintiff's motion for a new trial based upon this final unresolved claim is denied.

Background

This action is what remains of a suit initiated eight years ago against at least thirty defendants. Plaintiff alleged violations under 42 U.S.C. § 1983 against the remaining defendants. He claimed that defendant, Nicholas Manobianco, then-Chief of the Adelphi University

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1 The plaintiff moved for a new trial on several grounds. He alleged that the Court erred in allowing the jury to take a copy of its instructions into the jury room during deliberations. He also argued that the jury instructions were "weighted unconstitutionally for defendants, and against plaintiff." Pl.'s Rule 59 Mem. at 1. Plaintiff also sought "to vacate the prior, non-final orders of Judge Raggi dismissing plaintiff's claims of Justification, defending Unborn Human Life, and Justification, exercising his Federal First Amendment Right, against Adelphi University and the Garden City Police." *Id.* at 1-2. The Court declined to reconsider the issue resolved by Judge Raggi. Finally, plaintiff objected to the dismissal of defendants Adelphi and Garden City.

2 The Court also granted defendants Adelphi University and Nicholas Manobianco, together with third-party defendant Village of Garden City ("defendants"), permission to file a response to plaintiff's further submission. Plaintiff was allowed to file a reply to defendants' response.

("Adelphi") security force, conspired with members of the Village of Garden City Police Department ("Garden City") to use excessive force upon the plaintiff when the plaintiff was arrested for trespass at Adelphi University. The case was tried to a jury in December 1993. During that proceeding, the Court dismissed plaintiff's claims against defendants Adelphi and Garden City. On December 16, 1993, the jury returned a verdict in favor of the remaining defendant, Nicholas Manobianco.

Discussion

In his only remaining claim for post-trial relief, plaintiff argues that the attorney for Garden City violated an instruction given by the Court that plaintiff's recent incarceration was not to be mentioned during trial.[3] During her cross-examination of Dr. D'Alessandro, plaintiff's psychologist, counsel for Garden City asked the witness the following question:

> Did [Rosano] ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and

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3 Prior to the beginning of trial, the Court directed counsel that they were not to mention plaintiff's subsequent conviction during the trial. Transcript Prior to Jury Selection at 6. The Court further clarified its ruling by stating that the subsequent conviction it was referring to was "the one that he was just incarcerated for." *Id.* at 16-17. Plaintiff was incarcerated for ninety-six days in 1993. *See* Plaintiff's Rule 59 Motion Supplement of August 1, 1994.

> down on by correctional officers in East Meadow?

Trial Transcript at 497 ("Tr."). Plaintiff's counsel immediately objected to the question and a sidebar conference ensued. Counsel for Garden City argued that the fact that plaintiff "told other people that he has been assaulted by other police officers in other police departments in the same exact manner, that the correctional officers in East Meadow also put his ankles together," was relevant to impeach plaintiff's credibility. *Id.*

Because the Court previously ruled that plaintiff's incarceration subsequent to the events that formed the basis for the claims being tried was not admissible, the Court struck counsel's question from the record. *Id.* at 498. The Court permitted counsel for Garden City to ask the question in a form that did not reveal that plaintiff had been incarcerated. Counsel rephrased the question to the witness as follows:

> At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

Id. at 498-99.

Plaintiff argues in his post-trial motion that counsel's questions sufficiently prejudiced the jury to warrant granting him a new trial. This Court will not grant a new trial unless it " 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco*

v. New York City Police Dept., 971 F.2d 864, 875 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

The initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial. The question was not answered by the witness and the Court promptly ordered that it should be stricken from the record. The question itself was not evidence and the jury was instructed accordingly twice by this Court, once prior to the beginning of trial and again during the Court's charge to the jury. *See* Tr. at 4, 623.[4]

In *Smith v. Lightning Bolt Productions, Inc.*, defendants moved for a new trial claiming that an improper question by plaintiff's counsel prejudiced the jury.[5] The Second Circuit affirmed the district court's denial of defendants' motion for a new trial and noted the following:

> Plainly this question was improper, but the court acted promptly to minimize any damage from it. It immediately struck the question, even before defense counsel could voice an objection, and it cautioned the jury to disregard the question.

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4 As part of its charge, the Court also instructed the jury that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." Tr. at 623.

5 While cross-examining a defense witness, plaintiff's counsel asked him, "Didn't [plaintiff] tell you that Mr. Solerwitz wanted to settle this case?" *Smith*, 861 F2d at 370. The question inappropriately made reference to settlement negotiations between the parties.

> There was no further mention of the subject within the hearing of the jury.

Smith, 861 F.2d at 370. *See also Alpex Computer Corp v. Nintendo Co., Ltd.*, 1994 WL 681752 at *34 (S.D.N.Y. 1994) (plaintiff's counsel's improper reference during his opening statement to the defendants' indemnification agreement did not warrant granting a new trial where the court sustained defense counsel's objection to the reference and instructed the jury at the end of trial that counsel's argument was not evidence).

Here, the Court similarly finds that the improper question by counsel for Garden City does not warrant a new trial.[6] The question was stricken from the record in its improper form and the jury was twice instructed that statements by counsel are not evidence.

The Court also finds that counsel's question in its restated form was not improper in that it did not make any reference to plaintiff's subsequent periods of incarceration. The inquiry was also relevant. Plaintiff had described a very unusual form

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6 The Court also notes counsel's explanation that her question was not a deliberate violation of the Court's pre-trial evidentiary ruling excluding evidence of plaintiff's subsequent conviction. Counsel states in her affidavit that she understood the "preclusion referred only to the most recent incarceration and not to the incident to which [she] was referring, which occurred in February or March 1991." Schuster Affidavit of February 14, 1994 at 4.

of abuse[7] and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police. The witness was carefully instructed by the Court that in responding to counsel's question he should not indicate "the circumstances of where it happened. Just if you can tell us what he told you." Tr. at 499. The witness did not refer to plaintiff's incarceration during his response.

Moreover, plaintiff's counsel did not object at trial to the question in its restated form. Absent plain error, a party's failure to object to the admission of evidence at trial precludes the party from raising the argument on appeal. *See* Fed. R. Evid. 103; *Huchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991).

Conclusion

The Court does not find that the verdict in this case was seriously erroneous. There was overwhelming evidence presented at trial that plaintiff's claims against the defendants were not credible. In addition, the Court does not find that counsel's question rises to the level of prejudice requiring a new trial.

Therefore, plaintiff's motion for a new trial based upon counsel's prejudicial question is denied. In his reply papers, submitted on January 6, 1995, plaintiff attempts to raise

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7 Plaintiff testified that while he was pinned to the ground, the security guards put his ankles together and began "jumping on [him] like a trampoline." Tr. at 69.

additional grounds for the granting of a new trial.[8] These claims are untimely and in any event are completely without merit.

SO ORDERED.

Dated: Brooklyn, New York, April 5, 1995
/Signature/Carol Bagley Amon
United States District Judge

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8 Specifically, plaintiff maintains that several Adelphi guards committed perjury at trial and that the jury instructions were prejudicial because the Court told the jury to consider all of the evidence presented. Pl.'s Reply Mem. at 18-22.

APPENDIX F
EXCERPT OF TRIAL TRANSCRIPT
DATED DECEMBER 1993

D'Alessandro/cross/Broderick

CROSS-EXAMINATION BY MS. SCHUSTER:

Q Can I see your records, doctor.
You remember meeting Mr. Rosano in the early part of 1991?

A Yes

Q Did he ever tell you that sometime prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

MR. BRODERICK: Objection, your Honor.

MR. WASHBURN: May we have a sidebar, your Honor?

MS. SCHUSTER: The plaintiff testified about that in his disposition, and it's in one of the medical reports in 1989 or 1991.

THE COURT: What's the relevance?

MS. SCHUSTER: That he has a habit, that he's told other people that he has been assaulted by other police officers in other police departments in the same exact

manner, that the correctional officers in East Meadow also put his ankles together.

THE COURT: I don't understand.

MS. SCHUSTER: It goes to show, if he told — did he tell him this or not?

MR. WASHBURN: This is a big question.

MS. SCHUSTER: On the credibility.

MR. WASHBURN: Very, very outweighed.

THE COURT: Did the question about being in jail —

MR. WASHBURN: These people are not joking.

MS. SCHUSTER: — it's an allegation—

THE COURT: How come you didn't cross-examine him about it?

MS. SCHUSTER: I just found it in the medical records, when I was looking through them.

THE COURT: If he says no, you're stuck with the answer.

MS. SCHUSTER: Okay.

THE COURT: You can't — and I'll tell them not to —

MR. WASHBURN: I'd like an instruction, your Honor.

THE COURT: I'll strike the question in its present form. You ask him whether he ever told him that police officers other than — or that police authorities other than Garden City and Adelphi did this to him.

MS. SCHUSTER: Okay.

THE COURT: I'll strike the question. Then if he says no, you're stuck with the answer, and you can't do anything else with it.

MS. SCHUSTER: Okay.

(Whereupon, the following occurred in open court.)

THE COURT: I'm striking from the record the previous question. Do you want to ask another question?

MS. SCHUSTER: Yes

BY MS. SCHUSTER:

Q At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in — had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

A Yes.

Q What did he tell you about that?

A He told me that he was —

THE COURT: Just with respect to the — actually what was done.

Q Not —

THE COURT: Not the circumstances of where it happened. Just if you can tell us what he told you.

THE WITNESS: Just that that individual had assaulted him. I do not remember the specifics.

Q Do you recall whether or not he told you that his ankles were placed together while he was on the floor, and his ankles were jumped up and down on?

A I don't recall that.

Q Do you recall he told you whether or not any other parts of his body were jumped up and down on?

A I do not recall that.

Q You do recall that he told you that such an occurrence involving a police authority other than Adelphi and Garden City?

THE COURT: With respect to what physically happened to him.

Q You do recall that he told you that something happened?

A Something happened to him, yes.

APPENDIX G
EXCERPT OF WRITTEN COPY OF JURY INSTRUCTIONS FROM TRANSCRIPT OF DECEMBER, 1993

9. Elements of § 1983 Action

In order to prove his claim, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following elements.

10. Conspiracy

a. First Element: Plaintiff must prove by a preponderance of the evidence that the defendant, Nicholas Manobianco, conspired with members of the Garden City police force to use excessive force upon the plaintiff.

Let me now instruct you on the legal definition of conspiracy. A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy is an agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests, is not necessarily proof of the existence of a conspiracy. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before you may find that the defendant has become a member of a conspiracy, it must be shown by a preponderance of the evidence that the conspiracy was knowingly formed, and that the defendant knowingly participated in some unlawful plan with the intent to advance or further some object or purpose of the conspiracy. To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake, accident or other innocent reason.

b. Unlawful Purpose

Second Element: The second element that plaintiff must prove by a preponderance of the evidence is that the conspiracy had an unlawful purpose. In this case, the plaintiff contends that the purpose of the conspiracy was to subject him to excessive force during the course of the several arrests he described. The plaintiff must also prove by a preponderance of the evidence that the purpose of the conspiracy was effected, that is, that excessive force was used against him. In this case, the plaintiff contends that as to the defendant Manobianco excessive force was used in connection with his arrests on two separate occasions: May 1, 1986 and August 26, 1986.

In this regard, you are instructed as a matter of law that under the Constitution of the United States every citizen has the right not to be subjected to unreasonable force while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law. On the other hand, in making a lawful arrest a person has the right

to use such force as is necessary under the circumstances to effect the arrest. Whether or not the force used in making an arrest was unreasonable is a question to be determined by you in light of the surrounding circumstances. You must determine the degree of force that a reasonable and prudent person would have applied in effecting the arrest under the circumstances shown from the evidence received in this case.

c. Reasonableness Under the Circumstances

If you find that the defendant, or someone you find to be a co-conspirator of the defendant, under the definition of conspiracy as I have previously explained it, used force during the arrests of plaintiff on May 1, 1986 and August 26, 1986, but reasonably believed that plaintiff was resisting or obstructing his arrest, or was attempting to escape and you find that the defendant or a co-conspirator needed to use force either to arrest the plaintiff or to protect himself, you must then decide whether it was reasonable for him to believe that the force he used was necessary.

In making that determination, you must take into consideration all of the circumstances confronting the defendant or a co-conspirator at the time and place of the incident, including but not limited to what he saw and heard; whether the plaintiff was resisting or obstructing arrest or attempting to escape; the amount of force used; whether there was assistance available to the defendant or a co-conspirator; what, if anything, he knew or had been informed about that plaintiff; and what, if anything, he knew or had been informed concerning the nature of the offenses committed. You must consider the circumstances as they reasonably appeared to the defendant or a co-conspirator on the scene at the time of the incident and not from the standpoint of hindsight.

11. Intent

If you find that the defendant or a co-conspirator used more force than was reasonable, you must then determine if he acted intentionally or recklessly. I instruct you that, to establish a claim under section 1983, the plaintiff must show that the defendant or a co-conspirator acted either intentionally or recklessly. If you find that the acts of the defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for the defendant.

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason.

An act is reckless if done in conscious disregard of its known probable consequences.

In determining whether the defendant or a co-conspirator acted with the requisite state of mind, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds, and your belief or disbelief with respect to those facts.

a. Color of State Law

Third Element: The third element that plaintiff must prove by preponderance of the evidence is that the defendant acted under the color of the authority of the state of New York.

Acts are done "under color of...law" of a state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and

beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise official powers.

As you will note, the federal statute, which the defendant is alleged to have violated, covers not only acts done by an official under color of any state law, but also acts done by an official under color of any ordinance or regulation of any county or municipality of the state, as well as acts done by an official under color of any regulation issued by any state, or county, or municipal official, and even acts done by an official under color of some state or local custom.

So, the phrase "under color of state law," includes acts done under color of any state law, or county or municipal ordinance, or any regulation issued thereunder, or any state or local custom.

b. Under Color of State Law: When Official Status Not Required

The defendant in this case, Nicholas Manobianco, was not an officer or employee of any agency of the state or political subdivision of the state. He was employed by Adelphi University, a private institution. Accordingly, he was a private actor, rather than a state official. However, an otherwise private person acts "under color of state law" if he engages in a

conspiracy with state officials to deprive another person of federal rights.

I charge you that members of the police force of the Incorporated Village of Garden City are state officials when acting within the scope of their duties as police officers. If you find from the preponderance of the evidence that the plaintiff has established the essential elements of his claim as defined in these instructions, and that the defendant was a willing participant assisting the state or its agent in the doing of the acts constituting the offense, then he is liable even though he held no official position or employment with the state.

On the other hand, keep in mind that the mere furnishing of information or assistance to police officers does not constitute joint action under color of state law under section 1983.

Plaintiff must prove by a preponderance of the evidence that the defendant exercised a power possessed by virtue of state law and was clothed with the authority of state law.

c. Overt Act

Fourth Element: The fourth element that plaintiff has the burden of proving is that the defendant or a co-conspirator engaged in overt acts pursuant to the conspiracy. This means there should be some act done to demonstrate an intent to use excessive force upon the plaintiff in furtherance of the conspiracy.

d. Proximate Cause

Fifth Element: The fifth element that plaintiff must prove by a preponderance of the evidence is that the conspiracy was the proximate cause of the injury to plaintiff.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The conspiracy, therefore, is the proximate cause of injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that a reasonable person would regard it as a cause of the injury.

e. More Than One Proximate Cause

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor, or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

In summary, if you find that the plaintiff has proved each element by a preponderance of the evidence, that is, that the defendant conspired with members of the Garden City Police to use excessive force upon the plaintiff, and that the defendant acted under color of state law, that pursuant to the conspiracy the plaintiff was subjected to excessive force, and that the defendant or a co-conspirator engaged in overt acts in furtherance of the conspiracy, and that the conspiracy was the proximate cause of injury, then you will find for the plaintiff.

If, on the other hand, you find that the plaintiff has failed to prove any of the five elements upon which I have just instructed you, then you must find in favor of the defendant.

Supreme Court, U.S.
FILED
JUN 16 1997
CLERK

No. 96-1822

IN THE

Supreme Court of the United States

October Term, 1996

LAWRENCE R. ROSANO,

Petitioner,

-v-

ADELPHI UNIVERSITY; JOSEPH CRAFA, NICHOLAS MANOBIANO, and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION BRIEF TO PETITION FOR WRIT OF CERTIORARI

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96-1822

In the

Supreme Court of the United States

October Term, 1996

Lawrence R. Rosano,

Petitioner,

- v. -

ADELPHI UNIVERSITY; JOSEPH CRAFA, NICHOLAS MANOBIANO, and VILLAGE OF GARDEN CITY,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI

DECISION BELOW

The unpublished opinion is set forth in Appendix A of the Petition. It affirmed a jury verdict in favor of the defendant Manobianco in this action, and dismissal as to Adelphi and Garden City. Respondents ADELPHI UNIVERSITY, DEAN

JOSEPH CRAFA and NICHOLAS MANOBIANCO, request the Court deny the Petition for a Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit.

STATEMENT OF COURT JURISDICTION

This Court cannot properly exercise jurisdiction over this Petition pursuant to 28 USC §-1257A. The questions presented for review in the Petition were not properly preserved for appeal and these newly presented arguments may not properly be considered.

Petitioner failed to object to the challenged jury instruction at trial, which is in any event, a proper statement of the law, and failed to object when the Trial Court gave written copies of the jury instructions to the jury.

As to Petitioner's claim of prejudice from the question by counsel for respondent Garden City, the question that was substituted for the "prejudicial" question immediately stricken from the record, did not reveal plaintiff had been incarcerated, nor was the handling of this matter by the Trial Court objected to by counsel at the trial.

STATEMENT OF THE CASE

Respondents ADELPHI, DEAN JOSEPH CRAFA and NICHOLAS MANOBIANCO, respectfully oppose the Petition for Writ of Certiorari. For the most part the Petition raises issues not raised at trial, nor preserved for Appellate review. Essentially the petition merely assails the jury's finding which was appropriately based on all of the evidence presented at trial.

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

Petition r commenced the underlying action against some 31 defendants claiming various violations of his constitutional rights, including his first, fourth and fourteenth amendment rights as a result of his arrest on the grounds of Adelphi University for trespassing on seven different occasions. (Petitioner had previously claimed against the United States and its various agencies and departments as a result of his dismissal from employment with the United States Navy in the position of a civilian engineer. (Appendix A-6a). During the appeals process of those various lawsuits, petitioner attended a paralegal training program at Adelphi University (Appendix A-7a). When his formal student status ended, plaintiff continued on campus using the library and word processing equipment to aid in presenting his arguments in those cases against the various Federal agencies in various Federal courts (Petitioner's Appendix A-4)).

On or about March 6, 1986, petitioner, a non student, was detained by members of Adelphi University's security force on the charge of harassing a co-ed and various individuals on campus, and as a result, on March 10th, a persona non grata letter was issued (Petitioner's Appendix A-4). That letter put plaintiff on notice that he would be subject to arrest by the Garden City police for criminal trespass under § 140 of the Penal Law of the State of New York if he were found on campus. Adelphi University is a private university and Rosano had no connection with and no constitutional right to be on the property of Adelphi. He was subsequently arrested on seven separate occasions after willfully ignoring the prohibition of the persona non grata letter, and was convicted of trespass for each arrest.

Petitioner's excuse for being on campus at the times of the arrests was that he needed the law library to pursue his Federal appeals on other cases, attacking abortion (Petitioner's Appendix A-4).

At trial, before U.S. District Judge Honorable Carol Bagley Amon, petitioner limited his claims to four of his seven arrests, asserting that excessive force was used in effecting his arrest on May 1st, 1986, August 26th, 1986, May 3rd, 1987 and May 4th, 1988. On each of the above occasions, petitioner was not using the law library or word processing equipment at the time of the arrest in question, nor was he engaging in his right to speak freely at Adelphi University regarding his beliefs on abortion. (Appendix B-40a-48a).

Plaintiff commenced this action by filing a complaint and two separate amended complaints, the last of which dated July 31, 1987 was some 85 pages, 320 paragraphs, with 13 listed causes of action, 17 listed claims for relief, in conjunction with 276 pages of exhibits against some 31 defendants.

The underlying complaint included several constitutional claims and a claim of conspiracy between Adelphi security officers and the Garden City police to use excessive force in effecting the four above mentioned arrests.

After numerous dismissal motions were granted, the list of defendants was reduced to three, Adelphi, Nicholas Manobianco, who was Adelphi's director of safety and security, and Garden City (1a-39a).

The case went to trial on December 13th, 1993. On December 15th the District Court dismissed the action with respect to Adelphi and Garden City, and on December 16th the jury

returned a verdict for Manobianco, the only remaining defendant.

Rosano moved for a new trial and the District Court denied that motion (Petitioner's Appendix A-16-29).

In the pre trial dismissal of Adelphi's Dean of Students, Joseph Crafa, plaintiff was granted leave to replead any claim for excessive force as against Dean Crafa and failed to do so. Plaintiff likewise failed to raise and/or preserve for review here the dismissal of the Dean of Students and Petitioner's claim against that individual are likewise not properly before this Court (Appendix C- 58a)

At the trial, plaintiff was his only witness and contrary to petitioner's assertion in the writ, conceded his claims were limited to conspiracy between Adelphi, Manobianco and the Garden City police to use excessive force in effectuating the four arrests, May 1st, 1986, August 26th, 1986, May 3rd, 1987, and May 4th, 1988. False arrest was not alleged at trial. In fact, plaintiff dropped any claim regarding the propriety of the persona non grata letter; and both the District Court below, and the Nassau County District Court in determining the criminal cases, necessarily decided that plaintiff was not a student and therefore not entitled to a hearing on the persona non grata letter (Appendix D-59a-61a).

Plaintiff conceded through counsel before trial, that he was declared persona non grata at Adelphi and on the occasion of every arrest, not lawfully on the premises of Adelphi (41a).

At trial plaintiff conceded he was given the 3/10/96 persona non grata letter and testified that on May 1st, 1986 he returned to campus for dinner with his girlfriend, was asked to leave,

refused, was arrested, handcuffed, brought to the security office and the Garden City police took him away.

On August 26, 1986, plaintiff appeared for registration, was asked to leave, refused and again arrested, he was restrained and removed by the Garden City police.

On May 3rd, 1987 plaintiff was found in the campus cafeteria and removed by Garden City police officers.

On May 4th, 1988 he was on campus looking for a co-ed friend, Linda Tedesco, and outside the cafeteria building was restrained by Adelphi security and arrested by Garden City police.

At trial Manobianco testified for the defendants regarding the circumstances of his involvement in two of the arrests and the issuance of the persona non grata letter (Appendix E; 62a-66a).

In addition, various Adelphi security officers testified and rebutted plaintiff's claims about the various incidents; the reasonable and necessary restraint, and no conspiracy or agreement to use excessive force. In addition, a student at the time of the events testified without objection that, among other things, Rosano had told her it was his intention to come to Adelphi and sit outside the campus center and play his sax until he got arrested so he could sue Adelphi.

The Roman Catholic chaplain at Adelphi since 1981 testified that in March of 1986, he made a complaint to Manobianco about Rosano and in May 1987 he witnessed the arrest of Rosano at the cafeteria which was without excessive force, the handcuffing of Rosano, and Rosano being the only one struggling.

Ed Miller, Chief of Security at Adelphi testified along with security guards Andrew Davis and Thomas Cox.

Finally, Rosano's treating psychologist was called by Adelphi, without objection; he saw Rosano from July 20th, 1989 to September 4th, 1991 diagnosing schizophrenia which was later modified to schizotypal personality disorder, a disorder the doctor opined the petitioner probably had for most of his life.

Rosano brought out on cross examination that Rosano reported to the doctor two unusual but very similar type beatings; where he was lifted by his handcuffs behind his back and while his ankles were crossed they were stepped on by members of two unrelated police agencies (Appendix F; 67a)).

Garden City's counsel then asked the doctor whether Rosano ever told him that some time prior he had been assaulted by a corrections officer in East Meadow in a similar manner. Plaintiff objected and the Court struck the question and without objection, allowed the same issue to be addressed in a rephrased question. Neither the stricken question nor the properly permitted follow up specifically addressed any arrest, conviction or even incarceration where this other alleged assault took place.

At trial the Court dismissed, with plaintiff's agreement, the third party claim against Garden City for failure to prove any action pursuant to an official policy and the failure to implead the individual police officers allegedly involved (Appendix G; 68a-70a).

The Court then dismissed the case against Adelphi, as there was no proof of an official policy and no sufficient proof in the record that Manobianco was a final policy maker. This was so, despite numerous opportunities granted the plaintiff to make the

requisite showing at the close of the case and before summations and charge.

Plaintiff conceded there was neither a policy alleged nor proof of sufficient facts regarding Manobianco's duties to find him a policy maker which were admittedly plaintiff's burden to prove, there being no vicarious liability under § 1983 (Appendix H; 71a-72a).

The case went to the jury solely on whether Manobianco conspired with the members of the Garden City police force to use excessive force that proximately caused plaintiff's injuries in the only two arrests where Manobianco participated, May 1st, 1986 and August 26, 1986 as agreed by plaintiff.

The jury returned a verdict in favor of the remaining defendant Manobianco, stating the petitioner herein had not established by a preponderance of the evidence that defendant Manobianco violated plaintiff's rights under § 1983 by conspiring with members of the Garden City police force to use excessive force in a way that proximately caused injuries to the petitioner. (Petitioner's Appendix D& E, A-16-29). Petitioner's subsequent Rule 59 motions were denied on all grounds which was affirmed by the United States Court of Appeals for the Second Circuit (Petitioner's Appendix A, 1-6).

REASONS FOR DENYING THE WRIT

POINT I

There is no jurisdiction to consider the arguments made by Petitioner.

This Court has no jurisdiction to consider Petitioner's arguments that are not properly preserved for appeal. Petitioner claims an incorrect statement of the law was given to the jury. However, there was no error in the charge, which was without exception or objection, nor was the statement of law to the jury "plain error". The instruction, which was without objection, required the plaintiff to prove the defendant acted under color of law, not "as a state actor".

Likewise, the claim that it was error in providing the jury with written instructions was never even raised at trial, and is not properly before this Court. United States v. Delano, 55 F3d 720, 732 (2d Cir. 1995). In either case as the Second Circuit held below, quoting United States v. Delano, Id., petitioner herein "cannot demonstrate any error, let alone surmount the higher "plain error" standard . . ." with respect to the above issues.

POINT II

The Court below correctly stated the law for the jury.

The instructions given to the jury correctly stated the law, and were given without objection from petitioner.

Absent objection, any error in the jury instructions may be pursued on appeal only if it is "plain error", that may result in

the miscarriage of justice or in "obvious instances of . . . misapplied law." Metromedia v. Fugasi, 983 F2d 350, 363 (2d Cir. 1992); (quotations omitted) cert denied, 508 US 952 (1993). In the present case the jury instructions set forth the proper standard for finding liability on the part of a private actor acting in concert with state officials. Adikes v. SH Kress & Co., 398 US 144, 150-152 (1970); Monell v. Department of Social Services for the City of New York, 436 US 658 (1978); and Rojas v. Alexander's Department Store, 924 F2d 406 (2d Cir. 1990).

Petitioner presents no argument to support a claim that the dismissal of Adelphi during trial or Crafa before trial was not proper. He argues only that the jury instruction as it relates to Manobianco was improper. The Court below properly held that Rosano's constitutional claims against the Adelphi defendants must fail except as to conspiracy because the defendants are not state actors. See, e.g. Flagg Brothers Inc. v. Brooks, 436 US 149, 156-157 (1978); Jackson v. Metropolitan Edison Company, 419 US 345, 349 (1974).

As to the conspiracy claims, private parties cannot be held liable under 42 USC § 1983 unless, in this case, they conspire with persons acting under color of state law, to deprive the Petitioner of a constitutional right. Singer v. Fulton County Sheriff, 63 F3d 110, 119 (2d Cir 1995) cert. denied 116 SC 1676 (1996). Since Rosano had no constitutional right to be on the property of Adelphi, a matter conceded by Petitioner, there can be no claim of false arrest. In fact, Petitioner conceded in the District Court he was persona non grata before he was arrested, and was then arrested seven times for trespass. He did not even contest that the arrests were lawful and that he was subsequently convicted of seven counts of trespass. At trial, the sole issue

was excessive force, which as between Petitioner and Manobianco, and limited to two occasions (Exhibit I; 73a).

In addition to the Court's charge being correct, the jury decided the facts against the plaintiff on the excessive force issue and he has had his full day in Court.

The instructions given, which comprise some seven pages (Petitioner Appendix A 35-40) accurately state the elements of a 1983 cause of action. In relevant part the Trial Court charged:

> " . . . Plaintiff must prove by a preponderance of the evidence that the defendant Nicholas Manobianco conspired with members of the Garden City police force to use excessive force on the plaintiff . . . .
>
> The second element the plaintiff must prove by a preponderance of the evidence is that the conspiracy had an unlawful purpose. In this case, the plaintiff contends that the purpose of the conspiracy was to subject him to excessive force during the course of the several arrests he described. Plaintiff must also prove by a preponderance of the evidence that the purpose of the conspiracy was effected, that is, that excessive force was used against him. In this case the plaintiff contends that as to defendant Manobianco excessive force was used in connection with his arrests on two separate occasions: May 1, 1986 and August 26, 1986. . . .
>
> If you find defendant or someone you find to be a conspirator of defendant, under the definition of conspiracy as I have explained it, used force during the arrest of plaintiff on May 1, 1986 and August 26, 1986, but reasonably believed that plaintiff was resisting or

obstructing his arrest, or was attempting to escape and you find the defendant or a co-conspirator needed to use force either to arrest plaintiff or to protect himself, he must then decide whether it was necessary for him to believe that the force he used was necessary . . .

If you find that the defendant or a co-conspirator used more force than was reasonable, you must determine if he acted intentionally or recklessly. I instruct you that, to establish a claim under § 1983, the plaintiff must show that the defendant or co-conspirator acted either intentionally or recklessly. If you find that the acts of the defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for the defendant. . . .

The third element that plaintiff must prove by a preponderance of the evidence is that the defendant acted under the color of the authority of the State of New York.

The defendant in this case Nicholas Manobianco was not an officer or employee of any agency of the state or political subdivision of the state. He was employed by Adelphi University, a private institution. Accordingly, he was a private actor, rather than a state official. However, an otherwise private person acts "under color of state law" if he engages in a conspiracy with state officials to deprive another person of Federal rights.

I charge you that members of the police force of the Incorporated Village of Garden City are state officials when acting within the scope of their duties as police officers. If you find from the preponderance of the

> evidence that the plaintiff has established the essential elements of his claim as defined in these instructions, and that the defendant was a willing participant assisting the state or its agent in doing of the acts constituting the offense, then he is liable even though he held no official position or employment with the state . . ."

Clearly, the charge taken in its entirety, which is the way it was given to the jury, with its explanations and definitions, was a proper statement of the law. The charge explicitly directed that the defendant was a "private actor"; and that he acts "under color of law if he engages in a conspiracy with state officials to deprive another person of Federal rights;" and did not require petitioner to prove defendant was a state actor.

Since Petitioner had no constitutional right to be on private property nor was he engaging in constitutionally protected activity at the time of his arrest, Petitioner had to prove that he was deprived of a constitutional right by Manobianco, in concert with state actors, such that his actions were done "under color of state law". Since the instruction, which was without objection, set forth the proper standard for finding liability on part of a private actor acting in concert with state officials, there is no basis to review this matter and the writ must be rejected.

POINT III

The question asked by the counsel for Garden City was not prejudicial.

Plaintiff had testified to being trampolined on in more than one arrest; jumped upon with his ankles crossed, a highly unusual repeat allegation that went to his credibility, his perceptions, and his mental state which entitled questioning his

treating doctor whether Rosano told him that about other authorities. The question was initially objected to and was rephrased so as to be asked without objection. The initial question was stricken from the record and the doctor answered yes that he had been told by plaintiff in the course of his treatment that he had been "trampolined" by other authorities, without details. Neither the initial question which was stricken from the record, nor the proper rephrasing, asserted this took place while the plaintiff was incarcerated or that he had been arrested or convicted of any other crime.

The Rule 59 motion produced close scrutiny by the Court of the alleged prejudicial question, and the Court did not find it prejudicial and denied the motion for a new trial by plaintiff.

U.S. v. Allegreti, et al., 340 F2d 254, 257 (7th Cir. 1964) involved cross examination of defense witnesses on the details of the long history of mental incapacity of defendant, although he had since been restored to sanity, and then involved questioning whether defendant recalled killing his step mother to which objection was sustained. The questions were held proper because they addressed the issue of credibility, loss of memory, and auditory hallucinations, and a subsequent conviction for another crime was affirmed.

The Court below properly held that it should not grant a new trial unless "it is convinced the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice . . . ". Sorlucco v. New York City Police Department, 971 F2d 864, 875 (2d Cir. 1992), Smith v. Lighting Bolt Productions Inc., 861 F2d 363, 370 (2d Cir. 1988). As the Court of Appeals for the Second Circuit correctly noted, any prejudice based on the question asked was minimized by immediately ordering the question stricken from the record, and the challenged statement

did not provide a basis for disturbing a jury verdict. More importantly, the jury was twice instructed that statements by counsel were not evidence. The relevant nature of the inquiry and proper second question which was without objection, precludes granting of the writ. See also Federal Rules of Evidence § 103 and Hutchinson v. Groskin, 922 F2d 722, 725 (2d Cir. 1991).

Contrary to Petitioner's claim, there was no evidence that Petitioner had a non felony criminal record, or a criminal record of any sort. Further, there was no contention that the Petitioner had made prior claims, only that the Petitioner had told a doctor about prior incidents.

Petitioner's unsubstantiated claim that defense counsel violated the Court's pre trial order is not supported and in fact was directly and appropriately addressed by the Court below, and not deemed to be a violation. There was no "idea planted in the mind of jury" as Petitioner claims, merely the fact that he told his doctor and others that the same unusual type of thing had happened to him on other occasions, an issue directly addressed to credibility.

Petitioner's contention that the jury was focusing on the Petitioner's subsequent criminal record and litigiousness is neither supported nor rational. The jury had a full and fair opportunity to evaluate all of the evidence in this case and it is neither supportable nor reasonable to conclude that one question in three days of testimony, which was never answered, accomplished what Petitioner would have this Court believe.

Contrary to Petitioner's claim, there were not "requests" by Petitioner's counsel for a curative instruction. There was one request and no objection, after the Court established an appro-

priate question, to this manner of handling by the Court, nor any further requests for any other instruction. There was neither error by the Court, nor basis for the contentions herein by Petitioner.

The fact that respondent was convicted of trespass was not disputed. He was lawfully arrested and convicted of trespassing at Adelphi, of which the jury was fully aware and Petitioner did not dispute at trial. There is no basis for Petitioner's claim that the jury would conclude this question addressed a post event misdemeanor incarceration, and there was simply no evidence or even an inference of a conviction before the jury. As such the challenged statement does not provide a basis for disturbing the jury verdict and the writ should be denied. See Smith v. Lighting Bolt Products Inc., 861 F2d 363, 370 (2d Cir. 1988).

POINT IV

It is both appropriate in this case and generally accepted to allow the jury to consider written instructions after they are given orally, to allow them to assimilate difficult individual concepts in the context of the entire charge.

It was proper to give the jury a copy of the charge in writing after the oral charge. Petitioner failed to object to the delivery of a written copy of the instruction at the time a copy was provided; and it is not "plain error" for the Trial Court to do so.

Contrary to Petitioner's contention neither the authors on the subject nor the Courts addressing the issue have held this to be an improper or prejudicial practice. The Court plainly held that delivery of the written text of the jury charge was appropriate in this case. United States v. Parent, 954 F2d 23, 25 (1st Cir.

1992) addresses not written instructions, but the mishandling of notes from a deliberating jury, contrary to Petitioner's claims. The cases cited do not stand for the proposition that it is improper to give a jury a copy of l- ıg and often complicated sets of legal instructions that are first given orally. The Courts have routinely held that the decision is one committed to the Court's discretion. Wright & Miller, Federal Practice and Procedures § 2555 (1971). As the Courts which have addressed this issue have held, "a judge may, but need not, give the jury a written copy of the complete charge at the outset of deliberations. . . ".

This was done at bar, and not objected to, and is certainly not plain error. In fact the practice is approved. Devitt-Blackman, Federal Jury Practice and Instructions - Civil and Criminal Volume 3, ". . . jury instructions are to be understandable and correct in law. Some Federal judges are giving written instructions in addition, especially when sitting in states where such is the practice . . . " The preface to Volume l in that treatise indicates the desire for clear, precise, balanced instructions as the goal and written instructions can certainly supplement those given orally to allow the jury the opportunity to study often difficult and convoluted concepts of law. This is certainly, in view of the failure of Petitioner to object at trial and the correctness of the instructions, not a basis to grant the writ.

CONCLUSION

For all of the foregoing reasons, Petitioner had a full and fair opportunity to be heard on all of his claims. He had a fair trial where the jury found in favor of the defendant. There was no error at trial, no basis for new trial, no properly preserved basis for the claims herein, and no error. The Petitioner is not entitled to a new trial as no argument is even presented in the

writ supporting claims against Adelphi University or its Dean of Students; and therefore it is respectfully requested the writ be denied and by that action, judgment of the Second Circuit be affirmed and for such other and further relief as to this Court deems just and proper.

Dated: Mineola, New York
June 13, 1997

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--x

LAWRENCE R. ROSANO,

Plaintiff,

-against- CV 87-0876 (RR)

REPORT AND
RECOMMENDATION
TO JUDGE RAGGI

ADELPHI UNIVERSITY,
JOSEPH CRAFTA [Dean of Students],
NICHOLAS MANOBIANCO [of Adelphi Security],
HENRY WILSON, INC. VILLAGE OF GARDEN CITY,
GARDEN CITY POLICE, COUNTY OF NASSAU,
NASSAU COUNTY POLICE,
TED SIGWART (Badge No. 108) [of Garden City],
WAYNE VOGEL (Badge No. 117) [of Garden City],
K. JACKSON (Badge No. 150) [of Garden City],
G. BECKET (Badge No. 104) [of Garden City],
- SCHROEDER (Badge No. 154) [of Garden City],
SGT. SULLIVAN (Badge No. 33) [of Garden City],
CAPT. GINHARDT [of Garden City],
- DI PAULO (Badge No. 37) [of Garden City],
- THORN (Badge No. 106) [of Garden City],
VINCENT PANTOLILLO (Badge No. 139) [of Garden City],
- FITZPATRICK (Badge No. 32) [of Garden City],
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, UNITED STATES MERIT SYSTEMS PROTECTION BOARD, UNITED STATES OF AMERICA, NASSAU COUNTY OFFICE OF DISTRICT ATTORNEY, DENNIS DILLON, DISTRICT ATTORNEY OF NASSAU COUNTY,

MARGARET HURST, ASST. DISTRICT ATTORNEY OF NASSAU COUNTY, JOY WATSON, ASST. DISTRICT ATTORNEY OF NASSAU COUNTY,
JUDGE O'CONNELL [Nassau C unty District Court],
JUDGE MEDOWAR [Nassau County District Court],
JUDGE MARK MOGIL [Nassau County District Court] and
DISTRICT COURT OF NASSAU COUNTY, FIRST DISTRICT.

Defendants.

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This case has been referred by the assigned judge to the undersigned magistrate for the supervision of all discovery proceedings and for the resolution of pretrial dispositive motions. Four motions for summary judgment have been presented.

I. By Notice of Motion, and Memorandum of Law, dated September 25, 1987, the United States of America, the United States Office of Personnel Management (OPM) and the United States Merit Systems Protection Board (Board) (hereafter the "Federal defendants") move to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants claim that the doctrines of res judicata and collateral estoppel bar the suit against them.

Plaintiff opposes by Memorandum of Law dated October 15, 1987. The motion was argued orally before the undersigned magistrate on December 22, 1987.

II. By Notice of Motion, and Memorandum of Law, dated October 19, 1987, Nassau County District Court Judges O'Connell, Mogil, and Medowar, and the Nassau County District Court, First District, (hereafter the State defendants) move to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim, pursuant to Rule 12(b)(1) & (6) of the Federal Rules of Civil Procedure. Defendants claim that they are protected by judicial immunity, that the complaint fails to

particularize the elements of a Section 1983 claim, 42 U.S.C. § 1983 (1981), and that the Eleventh Amendment is a bar against bringing an action against the District Court.

Plaintiff opposes by Memorandum of Law dated December 1, 1987.

III. By Notice of Motion, Affidavit of counsel, and Memorandum of Law, dated December 21, 1987, defendant Incorporated Village of Garden City, s/h/a Garden City Police moves to dismiss the claim against it pursuant to Rule 12(b)(6). Defendant claims that plaintiff has failed to allege a constitutional right that has been violated. Defendant also maintains that this court has no jurisdiction over the pendent state claims sounding in tort because they are not pendent to any federal claim. Additionally, it is alleged that plaintiff's state claim would be barred by failure to timely file a Notice of Claim pursuant to Section 50(e) of General Municipal Law (McKinney 1986). Defendant moves for costs, attorneys fees, and imposition of sanctions under Rule 11.

IV. By Notice of Motion, Statement of Facts, Memorandum of Law, supporting Affidavit of Fact, and Affirmations of William Jaffe, and Nicholas Manobianco, dated January 14, 1988, defendants Adelphi University, Adelphi University Security, Nicholas Manobianco, and Dean Joseph Crafa move for an Order dismissing the Complaint for lack of subject matter jurisdiction. Adelphi defendants assert that there is neither a constitutional violation or a claim properly alleged under Section 1983 over which the court has subject matter jurisdiction. They also move to have the state claims dismissed for lack of pendent jurisdiction. There is no opposition.

No motion has been made on behalf of the defendant County of Nassau, the defendant policemen, or defendant district attorneys.

The plaintiff has filed three complaints. The original complaint (Docket Entry No. 1) was filed March 20, 1987. An

"amended complaint" dated July 3, 1987, was filed July 6, 1987, as Docket Entry No. 3. Another document, also entitled "amended complaint" and dated July 31, 1987, was filed August 10, 1987, as part of a motion for leave to file the same (Docket Entry No. 5). To say that they are lengthy, and difficult to understand, is an understatement. Nevertheless, inasmuch as the plaintiff is acting pro se, an earnest effort has been made to understand the third complaint even though it took five hours to read, and attempt to comprehend, its 85 pages and 320 paragraphs, 13 listed causes of action, and 17 listed claims for relief, quite apart from the 276 pages of exhibits incorporated by reference therein. No attorney or judicial officer should be asked to undergo such an ordeal. If the plaintiff's position is incorrectly stated below, it is not from lack of effort. It is not entirely clear which of the three complaints the federal defendants are addressing, but apparently it is the original complaint. The state defendants clearly address the latest complaint (July 31, 1987), for that is the only complaint in which they are named. It is unclear which complaint the Village and Adelphi defendants are addressing in their motions, inasmuch as the caption on their papers differs from that on any of the filed complaints. However, the analysis herein applies equally to all of them.

Adelphi defendants request oral argument. That request is denied. While normally the court will hear each party in an action, oral argument has been heard on a similar motion to dismiss by federal defendants on December 22, 1987. It does not appear that further argument will disclose new facts or sharpen the arguments in support of any of the parties contentions.

SUMMARY OF CONCLUSION

I recommend as follows:

1. The motion to dismiss the claim against federal defendants should be granted. Rule 11 sanctions are appropriate.

2. The motion to dismiss the complaint against the state defendants should be granted.

3. The motion to dismiss the complaint against The Village of Garden City s/h/a Garden City Police should be granted in part. To the extent that it alleges violations of Federal law, it should be granted. To the extent that it alleges pendent state claims of respondeat superior against its police officers, it should be denied. Partial costs and attorney fees should be awarded at this time. Rule 11 sanctions are not warranted.

4. The motion to dismiss the complaint against the Adelphi defendants should be granted in part and denied in part.

5. On the court's own motion the complaint against the district attorney defendants should be dismissed on grounds of prosecutorial immunity.

6. On the court's own motion the plaintiff should be required to prepare, serve and file a third amended complaint which separately states each claim against each defendant, as well as the jurisdictional and factual basis for each claim. It is a practical impossibility for the defendants to adequately answer the complaint in its present form or to prepare a defense thereto.

The ground for dismissal is different as to each movant. The recommendation as to each motion will therefore be discussed separately. However, the events that have lead to plaintiff's bringing this action against the numerous defendants are relevant to a determination of all the motions. Likewise there is a repetition and an overlap of the legal theories that plaintiff states in his complaint as applicable to the various defendants. Therefore, before discussing each motion separately, a statement of facts is presented which will also help show the genesis of plaintiff's legal theories.

STATEMENT OF FACTS

The complaint itself alleges the facts described below.

The events underlying this case began on November 5, 1979, when Mr. Rosano, the plaintiff, was hired by the United States Navy to be a civilian engineer at its Marine Training Base, Camp Pendleton, California. Like all new federal employees, he was offered a choice of health plans. These plans are selected by the defendant United States Office of Personnel Management from those offered by private insurers. Every one of them includes coverage for abortion and contraception. Premiums are paid in part by the United States out of general revenues with the remainder paid by the employee choosing the plan.

Mr. Rosano objected to being required to choose among plans, all of which included this coverage. But, he was in need of having some form of health coverage, and, so, by November 13, 1979, he did select one of them.

During the remainder of his employment with the Navy he devoted a substantial amount of his working time to demanding a plan which omitted this coverage. During April and May of 1980 he devoted all of his working time to this activity. Therefore, he was fired on May 31, 1980.

Thereafter he brought six lawsuits to protest his being fired, as follows:

1. Rosano v. Department of Navy, 4 M.S.P.B. 516 (1980). Appeal to U.S. Merit Selection Board; termination upheld.
2. Rosano v. U.S. Marine Corps., 229 Ct. Cl. 780 (1982). Appeal of first M.S.P.B. decision; Held; termination aff'd., remand of First Amendment Claim.
3. Rosano v. U.S. Marine Corps., 10 M.S.P.B. 67, 11 M.S.P.B. 79 (1982) On remand from Court of Claims to determine First Amendment claim; Held: no jurisdiction to review OPM selection of health plans.

4. Rosano v. Department of Navy, 699 F.2d 1315 (Fed. Cir. 1983). Appeal from second Board decision; Held: Board decision that it lacked subject matter jurisdiction to review OPM contracting decision affirmed.

5. Rosano v. Secretary of the Navy, CV 82-0987 (JLI) (S.D.Cal. 1983) aff'd 735 F.2d 1372 (9th Cir. 1984), cert. den. 105 S. Ct. 181 (1984) Suit under 42 U.S.C. § 2000e-16 (1981); Held: motion to dismiss granted, no material issue of fact to negate defendant's claim that plaintiff was dismissed for performance based reasons.

6. Rosano v. United States, 9 Cl. Ct. 137 (1985), aff'd 800 F.2d 1126 (Fed. Cir. 1986) Suit for monetary relief under Tucker Act; Held: dismissed for lack of subject matter jurisdiction over termination claim. (Action barred by res judicata); other claims dismissed on jurisdictional grounds.

In 1983, during the appeals and progress of the various suits in Federal Courts, plaintiff enrolled in the course of study for paralegal training at Adelphi University in Garden City, New York. While plaintiff was enrolled as a student, he availed himself of the opportunity to use the computer terminals and word processor equipment available to Adelphi students. During this time plaintiff was engaged in preparing legal memoranda in support of his various cases. He obtained permission to continue use of the word processor equipment when his formal student status ended. In 1985 and 1986 he signed up for Italian courses, as a non-matriculated student, for the express purpose of preserving his access to this equipment. Although not a fully matriculated student enrolled in a full program, plaintiff was frequently present on the Adelphi campus. He also achieved a degree of notoriety for his persistence and dedication to stopping the "war on unborn human beings," and "loosen[ing] the tenticles of religious discrimination against him and that of his 'prolife' class" which results from government support of

abortion (either from the grant of tax exempt status to organizations providing abortion services, or by government funding of portions of premiums in abortion-covering health plans.)

On March 6, 1986, plaintiff was detained by the Adelphi University Security force on a charge of harassing a co-ed. Despite being promised a hearing by the Chief of Security, defendant Manobianco, the plaintiff was issued a 'persona non grata' letter (hereinafter PNG letter), without being given a hearing. As a recipient of such a letter, plaintiff was put on notice that he would be subject to arrest by the Garden City Police for criminal trespass under Section 140 of the Penal Law of the State of New York if he was subsequently present on the Adelphi campus. His partial student status was revoked and his use of the law library and word processing equipment came to an abrupt end.

Between March 1986 and May 1987 the plaintiff was arrested six times for coming on the Adelphi campus despite the prohibition of the PNG letter.

March 22, 1986: Returned to Adelphi campus to use the word processor and was arrested by defendant Garden City Police Officers Sigwart and Vogel in the law library without any prior inquiry by them as to whether he had been afforded a hearing by Adelphi before the PNG letter was issued, without stating the reason for the arrest apart from showing him the PNG letter, and without probable cause. He was then turned over to the Nassau County Police who held him all day in uncomfortable handcuffs for arraignment. At arraignment defendant ADA Hurst offered to drop the charge if he agreed to stay off the campus. He refused.

April 27, 1986: Being fearful he would not get his Appellate Brief filed on time, he returned to the campus computer center where he was arrested by defendant Garden City Police Officers Jackson, Sullivan, DiPaulo, and others, one of whom needlessly,

deliberately bent and damaged his metal briefcase. They held him for four hours. The next day he was held all day by the Nassau County Police for arraignment in needlessly and deliberately overtight handcuffs.

May 1, 1986: Returned to campus for dinner in a dormitory with a friend and was arrested by defendant Adelphi Security men Manobianco and Wilson. Manobianco needlessly punched him in the nose, causing blood to flow down his face. He was then turned over to Garden City Police, whose Capt. Ginhardt (a defendant) photographed his face with the blood on it before turning him over to Nassau County Police, and he was arraigned the next day. Capt. Ginhardt subsequently said he lost the photo.

August 26, 1986: Returned to campus to register for fall term, so as to regain access to the computers. Was taken out of line by defendant Manobianco and other security men who arrested him and beat him up by jumping on him and breaking one of his ribs. He was then turned over to Garden City Police whose officers, including defendants Sigwart and Ginhardt treated him as if he was feigning his injury and refused his request for treatment. He was then turned over to Nassau County Police and strip searched. While in the courthouse awaiting arraignment he was handcuffed so tightly that his wrists turned white and his hands tingled. The officer deliberately waiting a while before granting plaintiff's request that they be loosened.

April 21, 1987: Came on campus to wait for a friend and was playing his saxophone on steps in front of the Business Building. He was assaulted by defendant Manobianco and other Adelphi Security men and arrested by defendant Policeman Thorn. On being released, he returned to campus to get his car whereupon defendants Manobianco and Wilson ganged up on him and assaulted him.

May 3, 1987: Went to campus cafeteria. Campus security called the police. Defendants Vincent Pantolillo and Fitzpatrick came and asked him to leave. He agreed to do so after he

finished his tea. So they immediately arrested him forcefully, and he deliberately kicked Fitzpatrick who had him in a hammer lock. He was carried to the police car and taken to the police station. Defendant Manobianco took plaintiff's keys and impounded plaintiff's car. He was later released on $750.00 bail, raised with great difficulty. It cost $48.60 to get his car back, plus $15.00 for a taxi.

At his arraignment on May 4, 1987, defendant ADA Hurst whispered something to Judge Mogel, who then shouted out in the courtroom that plaintiff should not harrass girls, and that plaintiff's bail of $750.00 would not be refunded until the case was decided.

On September 27, 1987, during court proceedings, Judge O'Donnell decided that there need not be a hearing before issuing a PNG letter.

The 3rd, 4th, 5th and 6th arrests are still open cases.

STATEMENT OF CLAIMS

These facts give rise to a veritable host of claims.

(a) He was, for all practical purposes, impermissibly forced to make a choice between accepting and paying for objectionable coverage or foregoing coverage completely. See Thomas v. Review Board of Indiana, 450 U.S. 707, 67 L.Ed.2d 624, 101 S.Ct. 1425 (1981).

(b) being male, he has no need of health insurance coverage for abortion and contraception. To include it therefore constitutes discrimination based on his sex.

(c) being single, he also has no need of it. Therefore its inclusion constitutes discrimination based on his marital status.

(d) being a member of the Right to Life Party, which is opposed to contraception and abortion, its inclusion constitutes discrimination based on his political opinion.

(e)(f) being a member of the Roman Catholic church, which is opposed to contraception and abortion, its inclusion (1)

constitutes discrimination based on his religion and (2) is prohibited by the First Amendment.

(g) Utilitarianism is a religious belief that the end justifies the means. Affirmative action is a form of Utilitarianism. Coverage for abortion and contraception is a form of affirmative action. Therefore it is a form of Utilitarianism. Therefore, such coverage constitutes the practice by the Federal Government of the religion of Utilitarianism, which is prohibited by the First Amendment. It is actionable under Flast v. Cohen, 392 U.S. 83 (1968).

(h) The U.S. Civil Service Commission is authorized by statute to contract with qualified insurance companies to provide health insurance coverage to federal employees. 5 U.S.C. §8902(a). It prohibits certain forms of discrimination, namely: "race, sex, health status or . . . age." 5 U.S.C. §8902(f). It does not prohibit discrimination based on religion. But since religious discrimination is prohibited by the First Amendment and 42 U.S.C. 2000(e)-16(a), it should also have been included in 8902(f).

(i) He was fired without being afforded a hearing by the defendant Merit Selection Protection Board. Although he was a probationary employee, he had a right to such a hearing if he was discharged for a prohibited reason such as religious discrimination.

(j) All his cases, which hold that the MSPB lacked jurisdiction to entertain the merits of his various claims, are wrongly decided and so are nullities.

(k) No court has ever passed on the merits of these issues. Therefore, all the decisions in his cases are nothing more than judicial Bills of Attainder, prohibited by the United States Constitution.

(l) He had a right to devote all his duty time to urging this change in health coverage because under the National Labor Relations Act a reasonable opportunity must be given to Union

organizers to seek to induce fellow employees to join the Union. NLRB v. Babcock & Wilcox, 76 S.Ct. 684 (1956).

(m) His supervisors were apathetic to the problem so he had a right to engage in civil disobedience. See Nees v. Hocks, 272 Or. 210, 536 P.2d 512, (Or. 1975).

(h) Federal regulations require that all employee complaints be sent to the agency head involved irrespective of whether special counsel finds a substantial likelihood of validity. 5 CFR 315.806(c). This was not done.

(o) The Termination Notice did not include notice of appellate procedures, as indicated in 5 CFR 315.805 and 806(c).

(p) He was terminated for poor performance of duty, but Navy regulations provide that a probationary employee, such as himself, with less than nine month's service may not be fired for poor performance of duty.

(q) The stated reason for discharge, poor performance was a pretext. The real reason was religious discrimination.

(r) The "Code of Ethics for Government Service" requires that high moral principles be upheld. Nevertheless, the real reason he was fired was for upholding the high moral principle of life over death by abortion and constructive death by contraception.

(s) He has made a formal "Beneficial Suggestion" that health plans exclude coverage for abortions and contraception. This suggestion was not, but should have been, accepted. It would have resulted in the savings of large sums of federal tax revenues, and he should have received an appropriate monetary award under the Government's Beneficial Suggestion Program.

(t) To include this coverage is a matter of policy, a pattern of prohibited personal practices, which is a continuing violation. As such, the statute of limitations has not even started to run on it. See Hackett v. McGuire Bros., 445 F.2d 446, 447 (3d Cir. 1971).

(u) Nassau County has a similar program for its employees and funds Medicaid abortions. Being a resident of Nassau County, he has standing to seek to prohibit it by court action.

(v) The facts demonstrate the existence of a conspiracy between Adelphi security men, Garden City policemen, and Nassau County policemen to deny him of his Constitutional rights. Therefore he has a proper claim under 42 U.S.C. §1983 for improper exclusion from the campus, for false arrest, for malicious prosecution and assault.

(w) The same facts warrant a direct cause of action under the Fourth Amendment against the Adelphi defendants under the principle enunciated in Bivens v. Six Unknown Agents of the F.B.I., 403 U.S. 388 (1977).

(x) The same facts warrant similar pendent common law claims under state law including Adelphi's liability under respondeat superior.

(y) The same facts support claims under 42 U.S.C. §1983 against the Village of Garden City and its policemen, as detailed above, for false arrest and use of undue force.

(z) They also support similar pendent common law claims against the village policemen, and against the Village, both as direct action of the Village and respondeat superior.

(aa) The Adelphi incidents have become includible within the MSPB proceedings and so should be joined in and litigated in that action.

The plaintiff describes his action essentially as follows:

Amended Complaint

This is an action for damages
against U.S. Office of Personnel Management
for including mandatory contraception and abortion coverage in the Federal Employees' Health Insurance Benefits Program.

against the USA for funding it with tax dollars
against the U.S. Congress for funding it with tax dollars
against Nassau County
because of its employees' health insurance program.
against Adelphi University,
against its Nicholas Manobianco (Head of Security), and
against its Dean Crafa (Dean of Students)
for interfering with plaintiffs' legal right to prepare briefs in order to petition the government for redress of grievances (in his case Rosano v. US. 9 Cl. Ct. 137 (1985) which opposed such programs.)
against Incorporated Village of Garden City, and
against several of its police officers
for unlawful arrest
against Adelphi, Manobianco & Crafa
for conspiring with the Garden City Police Department to deprive plaintiff of his Constitutional and statutory right to defend unborn human life. See Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (Or. 1975).

The Plaintiff list his claims for relief under his "Wherefore" clause as follows:

Claims

I. 42 U.S.C. §1983
Adelphi et al—for conspiracy, false arrest, and malicious prosecution, as a penalty for his marital status, age, religion and political beliefs, in violation of his rights under First Amendment to free exercise of religion to petition the government for redress of grievance and Fourth Amendment right of due process and equal protection.

II. vs. United States, by enacting 5 U.S.C. §8902 (f) vs. OPM by adopting 5 CFR 890 which includes religiously offensive mandatory coverage.

III. Malicious prosecution vs.
Dennis Dillon, ADA Margaret Hurst, Garden City Police, Nassau County Police, Mr. Manobianco, Dean Crafa, Adelphi Security Guards.

IV. vs. Nassau County for funding abortion and contraception through its funding of Medicaid.

V. vs. Nassau County for the tort of converting employee's contributions to pay for coverage for abortion and contraception.

VI. vs. US—for same as V

PENDENT CLAIMS

VII. vs. Garden City and Nassau County
per Notice of Claim.

VIII. vs. US Navy for firing me for "poor performance" before the beginning of my 9th month of probationary service.
vs. US Navy for firing me for exercising my First Amendment Right to free exercise of religion and to petition the Government for redress of grievances.
vs. US Navy for firing me for reasons of sex, age, religion and politics.

IX. For pay for my beneficial suggestion, when it is adopted.

X. To order MSPB to entertain my appeal re: my firing and the Adelphi controversy.

XI. vs. Judge Medowar for denying my motion to dismiss—on a Bivens-type action for constitutional violation. See Davis v. Passman, 442 U.S. 226 (1979) and resulting compensation and punitive damages for thereby permitting contraception and abortions to continue.

XII. All Adelphi Security Personnel, Garden City Police, Nassau County Police must be criminally convicted of assault and battery unless they can prove beyond a reasonable doubt that what they did was the least restrictive means of achieving some compelling state interest.

XIII To dismiss all the assault and battery charges brought against him by Mr. Manobianco.

XIV. vs. Judge O'Connell for stating that "the Court of Appeals held that a hearing need not precede the issuance by a State College of a "PNG" letter. . . . Here we deal with a private university.

XV. vs. Judge Mogil for malicious prosecution by shouting in court that plaintiff was harassing girls, and based on that, refund of $750.00 bail would be withheld.

WHEREFORE, plaintiff seeks

a. Compensatory damages, joint and several, versus all for Two Billion Dollars,

b. Punitive damages, joint and several, versus all for Fifty Billion Dollars,

c. Establishment of rules of procedure in GCPD pertaining to arrests for violations of PL 140.10, which rules must be readily available and signed by the arrestee prior to any arrest and must inform the arrestee of all his rights.

d. Establishment of similar rules at Adelphi.

e. Other and further relief as appropriate and attorney's fees.

f. Declaratory judgment that the Federal Health Benefits Plan violates the First Amendment and that the violative part must be deleted from group coverage.

g. Declaratory judgment that Government funding of abortion and contraception violates First Amendment and cannot be included in employee's group health plans.

h. Declaratory judgment that abortion is unconstitutional, as it takes human life.

i. Declaratory judgment that contraception is unconstitutional, same reason.

j. Declaratory judgment that affirmative action is an unconstitutional practice of the religion of Utilitarianism by the Government.

k. All relief sought in plaintiff's petition for certiori in the Camp Pendelton matter, Rosano v. US.

l. Same as e.

m. A beneficial suggestion award.

n-o. For criminal conviction of Mr. Manobianco for eavesdroppping, assault and battery of plaintiff, with a five-year sentence to imprisonment.

p. Removal of Judge Medowar from the bench.

q. Removal of Judge O'Connell from the bench.

r. Additional damages from Judge Medowar.

(85 pages
320 paragraphs
+ 13 counts contained in Paras. 321-373.
+17 claims for relief.)

DISCUSSION OF INDIVIDUAL MOTIONS
Motion to Dismiss by Federal Defendants

I. Motion by federal defendants United States of America, Merit Systems Protection Board, and Office of Personnel Management to dismiss complaint for lack of subject matter jurisdiction. The motion should be granted.

Claim preclusion is a distinct concept within the doctrine of res judicata. [1] The claim preclusion branch of res judicata bars plaintiff from bringing a claim for constitutional violation against the Federal defendants.[2] The court also lacks jurisdiction to adjudicate plaintiff's claims brought under Title VII, as well

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[1]See, Migra v. Warren City School District Board of Education 465 U.S. 75, 77 n.1 (1983) for a succinct explanation of the difference between the terms claim and explanation of the difference between the terms claim and issue preclusion and the frequent confusion that results from their imprecise application. The Court stated that "claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated because of a determination that it should have been advanced in an earlier suit." Id.

[2]As an initial matter, it must be noted that plaintiff has not asserted a claim for violation of a constitutional right by an individual. While Bivens held that there was a federal common law cause of action against a federal official, as there would be under section 1983 for an official acting under color of state law, it did not obviate the necessity of identifying those officials as defendants. However, as this defect could be cured by amending the pleadings, it is not sufficient grounds on which to deny plaintiff his day in court and is not discussed here as grounds for dismissal.

I would also dismiss the claim against the Board if that defendant had moved for dismissal on the ground of immunity that attaches to a quasi-judicial body when it is acting in a judicial capacity. Here plaintiff asserts not misconduct by the Board, but simply that the decision was wrong. This contention appears to more appropriately addressed on appeal.

as those brought under 5 U.S.C. §§ 7702, 8902 and 8912, because of the preclusive effect which is normally given to issues actually determined in prior decisions of Federal Courts. Allen v. McCurry, 449 U.S. 90, 94 (1980). This also applies to agencies acting in a judicial capacity. See generally University of Tennessee v. Elliot, 106 S.Ct. 3220 (1986) (Court held that unlike state administrative decisions which had been judicially reviewed, unreviewed state administrative agency findings were not entitled to preclusive effect in Title VII actions, but were in 1983 claims which were administered in a truly judicial setting.) Further, the narrower concept of collateral estoppel bars relitigation of plaintiff's employment termination for cause. See Rosano v. United States, 9 Cl.Ct. 137, 142 (1985).

A. Claim preclusion, part of the judicially created doctrine res judicata, bars relitigation not only of claims that have been brought to valid, final judgment in a prior proceeding, but also of any other claims that could have been included in the proceeding. In the Second Circuit this discretionary doctrine prevents "claim splitting." It has a large potential for application because of the circuit's narrow definition of a claim. The Second Circuit held in Original Ballet Russe, Ltd. v. Ballet Theatre Inc., 133 F.2d 187 (2d cir. 1943) that an "aggregate of operative fact which gives rise to a ..." single legal wrong, although capable of being brought under several legal theories, is but a single claim. Id. at 189. Consequently, if several legal theories are possible means by which to vindicate a single wrong, and plaintiff does not unite his causes of action in a single suit, they will be lost. The Third Circuit has come to the same conclusion. "The fact that different statutes are relied on does not render the claims different 'causes of action'..." Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464 (3d Cir. 1950), cert. den. 341 U.S. 921 (1951). Case law is virtually unanimous in holding that a defendant cannot be repeatedly hauled into court to defend his conduct on a new legal theory if he has been victorious in de-

fending an earlier case on the identical subject matter. Montana v. United States, 440 U.S. 147, 153-54 (1979) (citations omitted).

Plaintiff's complaint is somewhat oblique as to what claims are alleged against which defendants, or what relief is specifically sought as to each. The gravaman of plaintiff's complaint is a section 1983 action for damages against these many defendants. This cause of action cannot be brought against any of these federal defendants, inasmuch as they were not acting under color of state law. The plaintiff presumably asserts jurisdiction on the basis of the rule of Bivens v. Six Unknown Named Agents of the F.B.I., 403 U.S. 388 (1971). In that case it was held that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts, . . ." See also Butz v. Economou, 438 U.S. 478, 486 (1977). No matter how plaintiff chooses to parse his complaint, the issue remains the identical grievance he has litigated against the federal defendants in the past. Plaintiff alleges that he was prohibited from exercising his First Amendment right to pursue his religious beliefs by being forced to choose between health insurance plans none of which excluded abortion and contraception coverage. He claims he is being discriminated against because of his religious beliefs, as well as being forced to violate them. By framing what plaintiff perceives to be a coercive choice, (accepting a health plan with abortion coverage or not accepting any health plan) as a First Amendment violation, plaintiff seeks to bring his action under 1983 for deprivation of a constitutional right. But, this very same health plan, with its take it or leave it effect as to abortion coverage, as well as plaintiff's on-the-job resistance to it, was the subject of a prior suit in the District Court in the Southern District of California.

In 1984 plaintiff filed suit under Title VII of the Civil Rights Act of 1964, §717, 42 U.S.C. § 2000e-16. Rosano v. Department of the Navy, CV 82-0987 (JLI) (S.D. Cal. 1983).[3]

In Rosano v. Navy the district court granted defendant's motion to dismiss in a one sentence decision. Plaintiff received a final personal judgment in this dismissal. Title VII law, as it has developed, requires plaintiff to make out a prima facie case of employment discrimination. If plaintiff is successful, the burden then shifts to defendant to make out whatever exonerating case is required under plaintiff's particular allegation of employment discrimination. See McDonnell-Douglas v. Green, 411 U.S. 792 (1973). In this case of religious discrimination allegations, defendant would have had to prove a reasonable accommodation to plaintiff's religious needs. 42 U.S.C. § 2000e(j).

The district court's dismissal of plaintiff's case on a motion means that he failed to make out a critical element of the prima facie case. Specifically, plaintiff failed to prove employment discrimination, as evidenced in the Ninth Circuit Court of Appeal's affirmation of the lower court's decision. In an unpublished decision this appellate court stated there was no evidence of religious discrimination, and, in fact, plaintiff conceded that he spent most of his time working on his grievance in order to gain a reduction of his premiums or a different health plan. Rosano v. Department of Navy, 735 F.2d 1372 (9th Cir. 1984) cert. den. 105 S.Ct. 181 (1984). See, Rosano v. United States 9

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[3]As an initial matter, plaintiff claims that he is not claim barred as he has not filed suit against these defendants before. But, the exact naming of defendants is not dispositive where the allegations made and the relief sought is identical as to those defendants named previously. Blonder Tongue v. University Foundation, 402 U.S. 313 (1970), NLRB v. United Technologies, 706 F.2d 1254 (2d Cir. 1983). And, as will be seen later, the claims plaintiff brings under other statutes are specifically barred against the MSPB and OPM.

Ct.Cl. 137, 142 (1985). Thus, plaintiff's section 2000e-16 claim was finally determined in district court, and he is barred from relitigating that claim.

He is barred, as well, from litigating the claim as a 1983 (Bivens) action because he could have brought it with the employment discrimination claim. He claimed that he was terminated for expressing his religious belief. He could have claimed that he was prevented from exercising his religious beliefs. The claim of termination for discriminatory reasons would not exist but for plaintiff's perceived need to resist an employment benefit on religious grounds.

Plaintiff's present action to this district court includes an allegation that his First Amendment right to free exercise of religion has been abridged. The government's conduct that has inflicted this constitutional harm is the offering, to plaintiff, of health insurance plans, with abortion coverage, from which he was entitled to make a selection.

It is apparent that there is but a single claim here that is being brought under separate legal theories. The legal wrong, as alleged by plaintiff is exacting a choice from him that compromises his religious beliefs. Whether the manifestation is in allegedly firing him because he pursued his right to exercise his religious beliefs against abortion by lobbying for a health plan acceptable to him, or in failing to facilitate his free exercising right by tailoring a health insurance plan to his beliefs, there is but one claim. Being but one claim, it should be litigated under all available causes of action in one lawsuit. Plaintiff failed to assert the constitutional claim when he brought the employment discrimination suit. The California District decision is entitled to preclusive effect in this federal court.

The propriety of applying res judicata to this case where plaintiff brings a section 1983, or Bivens-type claim, in the wake of an adverse decision of Title VII claim can be seen from other decisions where the same statutes were involved. This is so be-

cause of the particular affinity of these two statutes which allow recovery for rights violated by the same discriminatory acts as exemplified here.

In Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434 (9th Cir. 1981), the Court of Appeals for the Sixth Circuit barred plaintiff from bringing a 1983 claim after an adverse decision on a earlier Title VII claim, even though the law on Section 1983 had changed in the interim. The court held that the 1983 claim was available at the time of the first suit. Plaintiff could have brought her 1983 claim and sought thereby to upset the doctrine against suing a municipality as a person, which was later overturned in Monell v. Department of Social Services, 436 U.S. 658 (1978). That she failed to assert a claim available to her for, albeit, sincere reasons did not justify allowing plaintiff to seek recovery for the same injury in a different legal theory subsequent to an adverse prior judgment on the merits.

In McNeil v. McDonough, 515 F.Supp 113 (D.N.J. 1981), aff'd 648 F.2d 178 (3d Cir. 1981) plaintiffs brought suit under Title VII and section 1983 [as well as under the fourteenth amendment under 28 U.S.C. § 133(a)]. The court stated:

> As the decisions in this evolving field of employment discrimination seem to indicate, the substantive law is essentially the same without regard to whether the claim is asserted under 42 U.S.C. § 1981, et seq., or under Title VII, 42 U.S.C. § 2000e, et seq.
>
> In terms of "essential elements" that must be established, of course, these will vary with the applicable statute.

515 F.Supp. at 122.

The court made this statement in the context of outlining the specific elements of each statute. It applied the dispositive ele-

ments and evaluated the case on its own facts, ultimately determining that as a matter of law the plaintiff had made out a prima facie case.

B. The preclusive effect of the other statutory claims asserted against these federal defendants can more easily be determined. Plaintiff, under the authority of 5 U.S.C. § 7702 claims that he is entitled to Board review of his termination. Second Amended Complaint at ¶ 340. He alleges that he was terminated, not for failure to perform the job requirements, but because of his religious beliefs. However, the doctrine of res judicata bars relitigation of this issue of Board appeal for termination of a probationary employee, which has been litigated and decided in court. The plaintiff's claim has been litigated and decided. Rosano v. Marine Corp., 229 Ct. C. 780 (1982).

Plaintiff's first step upon termination (after futile discussions with the EEOC) was to appeal the employment termination and first amendment claim to the Merit Systems Protection Board. The Board did not address the first amendent claim, but upheld the termination. Rosano v. Department of the Navy, 699 F.2d 1315, 1316 (D.C.Cir. 1983).

The second step was to appeal the Board's decision to the United States Court of Claims. That court affirmed the termination decision and remanded the constitutional claim to the Board. Id. At that stage of the proceedings it had been determined that the Navy was free to terminate a probationary employee without Board review. The policy behind the procedure was to enable the government to have a trial period to test an employee's ability to perform the job's requirement for a limited period, without making an employment commitment. The court arrived at this decision by recourse to the definitional section of Title 5. 5 U.S.C. § 7511 (a)(1)(A) defines 'employee' as one who does not enjoy probationary status. Thus, it is only employees, as defined in the statute, who have the right to appeal to the Board. It is this right which plaintiff now claims under 5 U.S.C.

§ 7702. The decision of the Court of Claims is entitled to preclusive effect in this court. Plaintiff's suit under 5 U.S.C. § 7702 is barred.

C. Plaintiff also claims that under authority of Sections 8902(f) and 8912 of 5 U.S.C. §§ 8902(f), 8912, he is entitled to review of OPM's authority to offer only health plans with abortion benefits. This too is barred by res judicata.

In plaintiff's third stage of litigation, the Board on remand from the Court of Claims held that it had no jurisdiction to review OPM's authority to contract with health insurance carriers and to select a roster of health insurance plans to be offered to government employees. The power to contract was held to be largely discretionary and regulated by internal regulations. 699 F.2d at 1316. See 5 U.S.C. §§ 8901-8913 (1987).

Plaintiff's fourth step was to take an appeal of the Board's second decision to the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7710 (1980). The Court of Appeals first held it had jurisdiction to review the Board's decision under § 7710(b)(1), Id. at 1318, and then affirmed the Board's decision. In sum, the Court of Appeals decided that the Board was correct in its decision that it could not review OPM contracting decisions.

At that state of the litigation it had been fully, judicially established that not only was plaintiff's termination as a probationary employee not subject to review, but also that the Board could not review OPM's section of health plans. Those claims are no longer in issue and plaintiff is barred from seeking Board review of either matter.

However, now comes plaintiff with another statutory basis for review of OPM's selection of health plans. (5 U.S.C. § 8902). This too has been fully litigated and decided as unavailing.

The Court of Appeals for the Federal Circuit observed that review of OPM's decision might be open under 5 U.S.C. § 8902. 699 F.2d at 1319, n.31. The court noted that OPM's contracting

decisions were largely discretionary but that under 5 U.S.C. § 8912 (1976), as amended by the Federal Court Improvement Act, jurisdiction to review was placed concurrently with the District Courts or the Claims Court. Id.

Plaintiff did file suit in Claims Court, Rosano v. United States, 9 Cl.Ct. 137 (1985), claiming refund of his health insurance premiums and alleging jurisdiction under 5 U.S.C. § 8912. However, that court held that "jurisdiction would lie only if there was authority to award a money judgment on a claim otherwise provided for by the Health Benefits Act." 9 Cl. Ct. at 144. The court concluded that there was no such provision, and especially Section 8902 could not be interpreted as providing for compensation. The court stated that "(s)ection 890 of 5 C.F.R. deals with eligibility for enrollment and actions 'reviewing' a claim denied by a plan.' [Accordingly the court held there was no jurisdiction]...absent a denial of enrollment or benefits under a plan [and not] merely because [plaintiff] objects to the plans in the program." 9 Cl. Ct. at 144.

Plaintiff now proposes to review the constitutionality of OPM's selection of employee health plans under 5 U.S.C. §8902(f). Clearly this is foreclosed by the holding of the Claims Court as well as by logic. That section provides for relief in the event that a party has been excluded from a health plan and, moreover, does not even include exclusion for religious reasons.[4]

D. Plaintiff's remaining allegation that he has experienced a constitutional violation because he was terminated on the basis of his religious belief (Amended Complaint at 338) is barred by collateral estoppel. The reasons for plaintiff's employment termination were actually decided by the United States District Court

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[4] "(f) A contract may not be made or a plan approved which excludes an individual because of race, sex. health status, or, at the time of the first opportunity to enroll, because of age. 5 U.S.C. § 8902(f)"

for the Southern District of California. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on different causes of action involving a party to the prior litigation." Parklane Hosiery Co.. v. Shore, 439 U.S. 322, n.5 (1979). The District Court in Rosano v. Secretary of the Navy decided that there were no factual allegations to dispute the fact that plaintiff was terminated for cause. See 9 Cl. Ct. at 141.

At the risk of understating, it appears that plaintiff has had his day in court. He has had a fair and full opportunity to litigate his First Amendment and religious discrimination claims against these federal defendants. The claims against them should be dismissed.

During oral argument the plaintiff stated that the decision in Rosano v. Navy, supra, is clearly erroneous and that the D.C. Circuit has reversed itself in a subsequent decision. Neither of these facts, even if true, would warrant rejection of res judicata rules.

I have recommended that this case be dismissed on procedural grounds. However, even on the merits dismissal would be appropriate because the merits are unpersuasive. They are briefly discussed in the following paragraphs.

First among the claims that plaintiff urges now upon the court, and which have not been judicially decided, is the claim that he has standing to sue the government as a taxpayer for violation of a First Amendment Right under Flast v. Cohen, 392 U.S. 83 (1968). That decision cannot be read so broadly as to permit standing for a taxpayer in every First Amendment case. Other Supreme Court holdings that the litigant must sustain an identifiable, personal injury in order to sue, refute plaintiff's position. Pennell v. City of San Jose, 56 U.S.L.W. 4168, 4169 (Feb. 24, 1988).

Plaintiff urges application of the 'fruits of the poisonous tree doctrine' upon the court in this civil case. The court is aware of no authority which would make this doctrine appropriate in a case such as this which is so different from the doctrine's normal application, viz. the exclusion of evidence attained as a result of a Fourth or Fifth Amendment investigatory blunder. Plaintiff's claim that because the initial Board decisions were erroneous all subsequent litigation is tainted, and must be vacated, is without merit. No court has ever so held. Even erroneous decisions are binding until overturned by competent authority. If any person were to be permitted to ignore any rule which is, in his opinion, erroneous, the result would be civil chaos.

Plaintiff urges that he is entitled to "De facto conscientious objector status" pursuant to 50 U.S.C. §§ 451 et. seq., 456. On oral argument he emphasized that conscientious objector status requires (1) a sincere belief, (2) based on religious persuasion, which (3) is opposed to war in any form. He noted that his sincerity as a Catholic opposed to abortion has never been questioned. He contends that the killing of millions of unborn childing is as much a "war" as any "real shooting war" as defined in Sicurello v. U.S., 348 U.S. 385, 391 (1955). Hence, "De facto" status as a conscientious objector to the war against abortion should be recognized. Finally, that a failure in this respect would constitute impermissible discrimination against him on the basis of his religion. In sum, he argues that as a federal employee, he is being impermissibly forced against his will to choose between foregoing needed health insurance coverage or helping by his contributions towards the premium thereon to pay for the war against the unborn.

However, even conscientious objectors must pay taxes. Such status excuses the objector only from direct participation in the war. It would not excuse anyone from being required to support it financially. Compare U.S. v. Douglass, 476 F.2d 260 (5 Cir. 1973).

Finally, plaintiff asserts that Thomas v. Review Board of Indiana Employment Security Division, et al., 450 U.S. 707 (1981) is controlling in the present case. The rule of that case, and the companion case, Sherbert v. Verner, 374 U.S. 398 (1963) is, briefly stated, a requirement that an employee not be forced to violate his/her religion as a condition of employment. Plaintiff misconstrues the "important benefit" language in Thomas at 717-718. In Thomas the important benefit was unemployment compensation benefits. The case cannot be read to include all benefits that because of their cash value are important to the individual employee. Additionally, plaintiff was offered a health plan, not coerced into accepting it as a term of employment.

D. Rule 11 Sanctions

Plaintiff has had an opportunity to be heard on his desire to effect his First Amendment right to free exercise of religion. He believes that this religious conviction mandates that he "extricate himself from the tentacles of religious discrimination" (Complaint at 114) and to stop the war on unborn humans. He has also had notice of the principles of res judicata and collateral estoppel from other courts. See Rosano v. United States, 9 Cl. Ct. 137, 142 (1985). While this court is not inclined to prohibit any party, inclusive of a plaintiff acting pro se, from vigorously advocating his rights, the strictures of Rule 11 loom large.

It is impossible to read the complaint without recognizing that plaintiff is bringing another action to hold the government liable for not offering him a health insurance plan without abortion coverage. Indeed, a close reading of plaintiff's brief in his petition for a writ of certiori to the United States Court of Appeals for the Federal Circuit dated 1986 shows a striking similarity to the language in plaintiff's present complaint.

It strains credulity to argue that this is a good faith extension of existing law, as it has been decided by the one court that has jurisdiction that plaintiff is not being discriminated against or prevented from exercising his religious beliefs by voluntarily

paying his health insurance premiums and (when he was a government employee) accepting the benefits. Therefore, filing this action against these federal defendants is a burden on the court and harassment of these defendants. Sanctions under Rule 11 are proper. See Gaiardo v. Ethyl Corp., 56 U.S.L.W. 2349 (3d Cir. Dec. 14, 1987) (sanctions against pro se can be appropriate.) We do not here question the sincerity of plaintiff's views, or dispute his right to hold them. Indeed, this very issue is presently pending before Congress in Senator Danforth's proposed amendment to a pending civil rights bill. See N.Y. Times, February 10, 1988. We mean only that further resort to the Judiciary to persuade others of their merit, or to vindicate them in their own right, is an abuse of the judicial process and must now be foreclosed. Silvestro v. United States, 767 F.2d 30 (2d Cir. 1985). I recommend that plaintiff be enjoined from bringing another suit raising this claim under any legal theory against these defendants.

Motion by State Defendants

II. The complaint against the three state judges, who have ruled on the criminal trespass charge, pending against plaintiff in state court, should be dismissed. Absolute judicial immunity against suit has been granted in Section 1983 cases for judges acting in their judicial capacity. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). It appears that the judicial acts of which plaintiff complains were undertaken in the administration of the judicial process. Forrester v. White, 56 U.S.L.W. 4067 (Jan. 12, 1987).

Plaintiff's contention that certain decisions are plainly erroneous, and that others show a failure to diligently carry out judicial responsibilities, and thereby his constitutional rights have been violated, is without merit. Even were the allegations seriously grounded in fact, law, or reason, under out system of justice parties adversely affected by a decision have the remedy of taking an appeal, not suing the decision maker. Were this not so,

the judicial branch of our tri-partite system of government would exist at the whim of those effected. The public interest requires that the judiciary be free to interpret the laws without fear of personal reprisal. Scheuer v. Rhodes, 416 U.S. 232, 241 (1974). This concept is likewise embodied in Article III of the Constutition which states that federal judges may not suffer diminished salary or be removed from office during good behavior.

Having ruled that this court is barred from exercising jurisdiction over the subject matter by the doctrine of judicial immunity, it is not necessary to reach the other grounds presented or opposed for dismissal. However, in support of this court's decision to dismiss on judicial immunity grounds, a further comment on plaintiff's argument in favor of jurisdiction is warranted.

In plaintiff's Opposition to State Defendants' Motion to Dismiss, at page 16, plaintiff quotes from Scheuer v. Rhodes, 416 U.S. 232 (1974). In that case the issue was whether the Eleventh Amendment barred suit against a state official for deprivation of a constitutionally protected right when the official was acting under color of state law. If the suit was brought against a state official, but was in practicality against the state, the Eleventh Amendment to the Constitution would bar suit unless the doctrine of Ex Parte Young, 209 U.S. 123 (1980) was applicable. In Ex Parte Young the Supreme Court ruled that if a state official is acting outside of the authority delegated to him by the state, he is no longer a representative of the state, and the Eleventh Amendment no longer protects him. 416 U.S. at 237.

It is the doctrine from Ex Parte Young that plaintiff inappropriately quotes in support of his theory that judges may be stripped of their judicial immunity in the presence of sufficient factual allegations that they have deprived an individual of a constitutional right. Even though plaintiff claims that these judicial acts have deprived him of a constitutional right, the doctrine of Ex Parte Young has no application to the matter of judicial

immunity, as opposed to state immunity. Judges may be appealed, or impeached for egregious acts of misconduct, but the court knows of no authority which allows them to be sued for decisions made in the context of judicial acts. Accord Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978).

The claim against the Nassau County District Court for damages should also be dismissed under the state's protection against suit granted in the Eleventh Amendment.

Motion by Incorporated Village of Garden City

III. Motion by the Incorporated Village of Garden City, also sued herein as "Garden City Police" to dismiss the complaint as to itself for failure to state a claim against it. [1] Considered as a whole, the complaint affirmatively negates any claim of deprivation of any federally protected right by this municipality.

The plaintiff's claim against the municipality is based on 42 U.S.C. § 1983, which provides a procedural remedy, not a substantive right. It was enacted to provide a federal forum when state officials, in the exercise of their power, failed to observe federal limitations on their authority. In the absence of a violation of a substantive right safeguarded by federal law it has no application.[2]

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[1] At a prior conference, counsel for the Village expressly stated that he did not represent the individually named defendant police officers. Further, the plaintiff has not filed any proof of service of the summons and complaint upon any of them.

[2] In addition where, as here, the defendant is itself a municipality the alleged violation must have been committed by its representative pursuant to municipal policy, express or implied. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The Complaint, prepared by the plaintiff pro se, does not expressly allege that the plaintiff was arrested

Here, the plaintiff alleges violations of the First, Fourth, Fifth and Fourteenth Amendments.

The claim of a First Amendment violation by the Garden City Police is more appropriately discussed in the section on Adelphi's motion to dismiss. It is not seriously contended that it was the Garden City Police who prevented plaintiff from exercising his free exercise right by impeding access to the computer terminals, especially when plaintiff was not near that equipment on four of the six arrests.

The Fifth Amendment charge can be summarily disposed of in that the amendment's only possible application in this case could be a due process violation. The amendment, as such, has been held applicable to the Federal government, a situation not here charged. It is relevant only in the Fourteenth Amendment context, discussed below.

The Fourth Amendment prohibits unreasonable seizures of a person by the government. This has been held to mean that an arrest must be based on 'probable cause'. Probable cause, in turn, has been held to mean that in order to arrest a person outside the sanctity of his home, without a judicially issued warrant, the arresting officer must have reason alia, that a crime has been committed.

Plaintiff contends that his arrest was wrongful. (illegible) because Adelphi had no authority to exclude him from the campus the manner they did. However, the important question, here, is whether the arrest by the Garden City Police was unconstitutional. To be so it must have been without probable cause, or, possibly as a due process violation. That is to say, the police must have had no reasonable belief that plaintiff had committed

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pursuant to a prohibited policy, but since it does allege he was arrested six times by members of this defendant's police department for the same cause it does fairly allege conduct pursuant to policy. Adickes v. Kress & Co., 398 U.S. 144 (1970).

any criminal act, and that they made no reasonable effort to establish that criminal-type conduct had occurred.

It appears from the complaint itself that the Garden City Police had probable cause to arrest plaintiff. The Adelphi Security Personnel had informed them that he was a trespasser. The police had been informed of plaintiff's persona non grata status and of the charge of harassing full-fledged students on the campus that let to its issuance. The police were regularly called by the Adelphi Security department to make arrests when criminal conduct took place on campus. The police had ever reason to believe that a crime, criminal trespass, had been committed, and to subsequently make the arrest. The complaint is devoid of any allegation to indicate that plaintiff was arrested for any reason save violating the persona non grata letter, which put him on notice that future campus presence would be considered a criminal tresspassory act.

Plaintiff also alleges a Fifth Amendment due process violation to which the States are bound by the Fourteenth Amendment. Plaintiff contends that his liberty interest was curtailed without due process each time he was arrested. The Constitution does not guarantee that liberty will not be curtailed by state governments. "Liberty's" protection falls under the safeguards of the Fourteenth Amendment. Thereby, the Constitution asserts that the body of liberty and property rights, which are created by state law cannot, once created, be taken or abrogated by the state without due process. See Paul v. Davis, 424 U.S. 693, 711 (1975).

In plaintiff's case, due process would mean procedural safeguards to prevent plaintiff from being arrested on any basis other than probable cause. The very process of establishing probable cause is the procedural safeguard required by the Fourteenth Amendment. And, indeed, the Fourth Amendment is enforceable against the States through the Fourteenth. Whether the Fourteenth Amendment is read as an independent source of lib-

erty, through its incorporation of the First Amendment, or only a procedural safeguard, the result is the same. The requirements of due process and probable cause become enmeshed. The Constitution prevents citizens from being victims of arbitrary and vindictive arrests by local authorities. Plaintiff in this case has been deprived of his liberty, but he has received all the process that is due at this juncture.

A separate issue exists as to whether Adelphi made the decision to exclude plaintiff from its territory with attention to proper procedures. The essence of plaintiff's adamantly stated position is that he should have been given an opportunity to confront the proponents of the charge of harassment before being banished.[3]

Plaintiff's claim that he has improperly been denied access to private property is a claim that must be thrashed out in state court. If plaintiff were to be found not guilty of trespass in state court, it would not change the outcome here. This claim is irrelevant to the claim of seizure by the police absent probable cause. "The Constitution does not guarantee that only the guilty will be arrested." Baker v. McCollan, 443 137 U.S. 137, 145 (1979). It requires only that police have reason to believe that the suspect is guilty before making the arrest. Plaintiff's claim that he is not guilty of the trespass charge is relevant to a claim under state law, either as a tortious act committed by one individual on another, or under state laws governing access to private property. Having here failed to allege a factual basis for a claim of a viola-

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[3] The court does not pass on this issue, here. It appears that the matter has not been fully resolved in state court. At a preliminary state of proceedings, the state court ruled that Adelphi could issue a persona non grata letter which would ban plaintiff from the campus without a hearing. Rosano's opposition to State Defendant's Motion to Dismiss at 5, citing decision by Honorable Geoffrey O'Connell, District Court Judge, Nassau County. However, the Judge further stated that the prosecution must make further proof at trial.

tion of a right secured by the constitution, the claim should be dismissed.

Finally, the single incident of overly tight handcuffing and the disbelief of plaintiff's asserted claim of injury to his ribs do no fairly allege a pattern of impermissible conduct in which the Village acquiesced.

Having recommended dismissal of the claim in the absence of any constitutional violation, I recommend an award of attorney fees and costs under 42 U.S.C. § 1988. Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985).

Rule 11 sanctions should be denied. This pro se plaintiff has asserted a good faith, although non-meritorious, argument that he believes he has been wronged under the facts and the law. Such an argument is not deserving of sanction.

The complaint can be read as asserting a direct claim against the Village based on a tacit policy of making arrests for violation of PNG letters issued without prior opportunity to be heard. This claim appears to state a cause of action under Adickes v. Kress & Co., 398 U.S. 144 (1970). St. Louis v. Praprotrik, _ US _ , 56 LW 4201 (3/2/88) is distinguishable on its facts.

To the extent that the complaint can be read as asserting a claim against the Village resulting from the use of excessive force by its officers in handling the six arrests, it appears that this court would have pendent party jurisdiction if the police officers are ever served. Dismissal at this time would be premature.

Motion by Adelphi Defendants

IV. Defendants Adelphi University, Adelphi University Securi including Nicholas Manobanco (sued herein a Mr. Manobianco) and Dean Joseph Crafa (sued herein as Dean Joseph Graffa), collectively referred to as the "Adelphi" defendants, move to dismiss the complaint as to themselves on grounds of lack of subject matter jurisdiction in that the complaint fails to allege a deprivation of any of his constitutionally protected rights or

interests by any of them, and so fails to allege any cause of action under 42 U.S.C. § 1983. Also that the alleged state law claims are not pendent to any alleged federal claim, and are barred by the applicable statute of limitations in any event.

Plaintiff commenced its action in this court invoking the federal question jurisdiction of 28 U.S.C. § 1331. He alleges a Constitutional violation asserted as essentially a First Amendment right although he also invokes the Fourteenth Amendment and a due process violation. Adelphi has purportedly prevented plaintiff from exercising free speech, pursuing his religious beliefs and petitioning the government for a redress of grievances. It is also said to be liable for the acts of its security personnel in doing so.

There is no valid claim of any attempt by Adelphi to curtail plaintiff's right to free speech. Plaintiff does not claim that Adelphi has prohibited him from speaking openly or publicly.[1] See Complaint at ¶¶ 165, 166. The alleged harm is that he has not been able to use its word processing equipment to prepare his appeal briefs for the adverse Claims Court decision. Adelphi States that he was banished from campus for aberrant and bothersome behavior. He was not directly prohibited from using the word processor equipment. This was a consequence of the University's action taken to maintain control of behavior on the campus. Such action does not represent a Constitutional violation. Plaintiff, by his own admission, has embarked on a mission. He claims this entitles him to use a means for propounding his views which is owned by Adelphi University, a private institution. In short, he believes that because the First Amendment to the Federal Constitution permits free speech and freedom to exercise religious beliefs without government restraints, he has

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[1] This does not mean to say that plaintiff does not complain of not having uninhibited access to the campus, but only that he has not attempted to, or been prohibited from, speaking his beliefs on campus.

a right to use Adelphi's word processing equipment to vindicate his free exercise right.

The argument fails for several reasons. Because plaintiff has the right to free speech and free exercise of religion, does not mean he has the right to be provided with the means to exercise these rights. Additionally, the First Amendment rights are not absolute. As an example, case law is replete with holdings that affirm restrictions as to time, place and manner on free speech. ACORN v. Tulsa, Oklahoma, 56 U.S.L.W. 2351 (10th Cir. Dec. 15, 1987). Also, the First Amendment, through the Fifth and Fourteenth is applicable to governments, not to private institutions. As stated by the Supreme Court in Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 "The Due Process clause protects individuals only from governmental and not from private action...." Finally, it is inconceivable that the First Amendment encompasses the notion that plaintiff should be allowed to appropriate private personal property to propound his own religious views. Adelphi is under no obligation or duty to assist him in propounding them.

Plaintiff alleges that his right to petition the government for redress of grievances has been violated by his inability to prepare his appeal briefs on Adelphi's word processors. This contention is without merit for the same reason and must be dismissed.

Plaintiff also contends that the privilege and immunity clause of Article IV of the Constitution has been offended. This too is unsubstantiated in law or fact and and must be dismissed.

Plaintiff alternatively invokes jurisdiction of this court under 28 U.S.C. § 1983 as respects the issuance of the PNG letter. This claim is fatally defective in two respects. As explained above, there has been no deprivation of a right secured by the Constitution. Second, there is no allegation that Adelphi was acting under color of state law in making its decision to ban him

from the campus. The legal correctness or incorrectness of that decision must be determined by the state court.

As respects the arrests and concomitant assaults, the plaintiff claims that the facts demonstrate the existence of a conspiracy between Adelphi security personnel and the Garden City policemen making the actions of the Adelphi personnel actionable under § 1983. While the claim of conspiracy is somewhat tenuous, the allegations appear to be sufficient to defeat a motion to dismiss them for failure to state a cause of action. These claims should not be dismissed. It is undisputed that plaintiff was arrested six times by the Garden City Police at the request of Adelphi security personnel. His claim that in doing so Mr. Manobianco and Mr. Wilson used extra-legal excessive force as a harrassing tactic, and that the resulting injuries were ignored, or evidence thereof was covered up or lost by the village policemen, is not disputed.

Any objection to this report and recommendation must be filed with Judge Raggi by April 18, 1988.

Dated: Hauppauge, New York
March 24th, 1988

DAVID F. JORDAN, U.S.M.

filed in Clerk's Office
U.S. District Court of E.D.N.Y
Hauppauge Office
Mar 24 1983
Entered

(16) about what he was doing at other campuses.

MR. VARVARO: Okay. Your Honor, if I may just add something, this lawsuit is based upon seven incidents at Adelphi, and I think that anything that he did to a student at campus that led to a subsequent complaint that occurred after the letter but before the last incident is admissible because the persona non grata letter was in effect throughout the time, after he was arrested the third occasion, if he came back and threatened a student, and they communicated it to Adelphi --

THE COURT: I understand what you're saying, is that there was more reason to enforce it. But I don't want to hear about activity after the incidence of excessive force.

MR. VARVARO: Okay, after the seventh occasion.

THE COURT: Are there seven incidences?

MR. BRODERICK: We're claiming five. He was arrested seven times, but he wasn't assaulted on all of them.

THE COURT: In terms of making an opening statement I suggest you do it in general terms, that there were complaints here that led to this letter.

But I don't want to hear anything in any opening statement about St. John's or the other campuses, I don't want to hear anything about the subsequent conviction. We'll have to hear what he says.

MR. VARVARO: When your Honor says the subsequent

* * *

(17) conviction.

THE COURT: I'm talking about the one that he was just incarcerated for, the bite—

MR. VARVARO: But the conviction at Adelphi.

THE COURT: I don't know how you get away from that. Did Mr. Manobianco testify to that.

MR. BRODERICK: Your Honor, we're going to concede that.

THE COURT: You're going to concede the conviction.

MR. BRODERICK: Of course he was convicted for trespassing. No issue on that. There is no issue about the fact that he was persona non grata before those incidents happened, we're not arguing those things.

We're saying even though he was trespassing, you can't beat him up. That's the whole trial.

THE COURT: But they are entitled it seems to me to give some background to this. It is relevant to why they arrested him, and I don't think that they have to have this completely in a vacuum. I don't want anything that occurred after these claims of excessive force, and I think that in terms of, you know, I may limit this if it gets to be cumulative as to what is being elicited, but I don't think that it has to be just considered in a vacuum. I mean this was the reason that the fellow was arrested, because he had done these things.

* * *

(28) MR. VARVARO: Your Honor—

THE COURT: How long is your opening statement?

MR. BRODERICK: About ten minutes, your Honor.

THE COURT: Why don't we hear opening statement and break for lunch. We have a note from a juror that says: I have classes on 5:30 Tuesday and Wednesday, I was not aware that the trial would end so late.

I'm not going to deal with this right now. He's a juror now. We can't kick him off at this point. So I'll discuss this at the end of the day with him and we'll just proceed now. All right. Do you want to bring the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: All right. Mr. Broderick.

MR. BRODERICK: Thank you, your Honor.

Ladies and gentlemen, colleagues at the bar, ladies and gentlemen of the jury. I will be as brief as I can, because you're going to be able to evaluate the plaintiff's own testimony when he testifies this afternoon. It's my job here just to give you sort of a summary of what the plaintiff's case will be.

Here is what he's going to tell you, very simple. On May 1st, 1986 he went to Adelphi University, he went to see someone there, he spoke to someone, I think it was a young lady, and they ordered some pizza, etcetera. He was brought out—by the way, he's going to tell you, it will come out,

* * *

sense that they're working together, in the sense that we're not saying they're in some dark room somewhere, but it's obvious what happened. He'd been assaulted. And it's obvious to a blind man that the police department should do something about this assault.

What did they do? Nothing. That's 1986. Still doing nothing and they're never going to do anything.

Okay. He goes to the hospital, you're going to see the hospital records, they're going to show you the damage to his nose or I think it's above his nose, his nose area. Hospital records will show you all of that. This is the first incident. There are other details—I won't take up your time with that—there are other details which he'll tell you about this afternoon.

Another incident happens, August of '86, four, five months later, Larry is back there again, he later got convicted for going back there, too, they told him not to and he went back, he felt he had a right to. He goes back there again. This time the word gets out Larry is back on the campus. Security guards come. They take him away. I think that he was registering or something. They take him away from everybody into a stairwell, no

witnesses, nobody around, into a stairwell. They say: Larry, you're not supposed to be here. They say: All right, Larry.

They handcuff him, put him on the floor and start (32) jumping up and down on him. they put one ankle across the other ankle, and then the fellow jumps up and down like this, grinding the ankles together, he still has trouble with his ankles today because of this. They didn't break his ankles. Caused him a lot of pain.

They don't want to hurt him. They want to cause him pain so he won't be back again. There's more details he'll tell you. Third incident, again he's back, this is about May of '87, he's back at the campus. Word gets out, apparently this time the Garden City police themselves come, about four or five come, he's sitting in the cafeteria having tea or something. They say: Larry, come out. Larry says: I'll go, let me finish my tea.

I think it was tea. They said: Oh, no you don't, Larry, that's it.

There's four or five of them, they get him and cuff him, cops cuff him. And then -- you should try this in the jury room a little bit, you can see how this works, it's called a streppado, you yank the cuffs up and keep yanking up, up, up, keep doing it, the pain can drive you insane, that's what he's going to tell you about. Then they take him and arrest him. Later convicted of trespass. Yes.

That's not the case we're presenting to you. We're conceding it right now, I've already told you that. There are other convictions for trespass, he kept going back. You're (33) here to decide whether or not he was assaulted. Whether or not there was a conspiracy to go along between the Garden City police and the Adelphi police to beat the hell out of him is what they're doing.

MR. VARVARO: Objection to the inflammatory language and the characterization of the claim as well.

MR. BRODERICK: I'll use different language, your Honor. To attack him in the ways I've told you, by causing him great pain which he'll also tell you about.

All right, a whole year passes, May of '88, almost the exact date two years later, he's back in the campus again, was he told not to be there, yes. Was he later convicted for trespass, yes, he was later convicted for trespass. That's not the issue.

The issue is how do you treat somebody who might be a trespasser? Do you punch him in the nose? Do you grind his ankles together? Do you use a streppado on him? They're back to the ankles again. Not the cuffs. This time it's the security forces. The whole load of them get him and he says to them: Wait a minute, I'll get out of here peacefully.

Larry tries to walk away, oh no, Larry, first we got to get you. They get him down, turned one ankle over the other, start jumping up and down. He finally gets released, gets processed and released, goes back to get his car, he meets another security officer, he says he wants to get his

* * *

(51) Rosano-direct/Broderick

THE COURT: Thank you. Mr. Broderick, would you call your first witness.

MR. BRODERICK: Yes, I will, Mr. Larry Rosano.

LAWRENCE R. ROSANO

having been first duly sworn, was examined and testified as follows:

THE COURT: State and spell your name for the report.

THE WITNESS: My name is Lawrence R. Rosano, R-O-S-A-N-O.

MR. BRODERICK: Is this microphone still working?

THE COURT: Yes, sure is.

MR. BRODERICK: I don't think that I'm going to need it, your Honor.

DIRECT EXAMINATION

BY MR. BRODERICK:

Q. Mr. Rosano, where do you live? A. 1662 Lydia Avenue, L-Y-D-I-A Avenue, Elmont, Long Island, New York.

Q. Do you know Adelphi University? A. Yes.

Q. How far is that from where you live? A. About eight, ten miles.

Q. Did an incident occur on May 1st, 1986 at Adelphi University? (52)A. Yes.

Q. Tell this jury what happened? A. About 8:30 at night I got in my car, drove into the parking lot of Chapman Hall, a dormitory where my girlfriend then, Tammy Fishman, dorms. I parked the car and I went in through the front entrance and I went to the desk to clear my license plate, license. I gave the license and she called Tammy to come down and escort me to her room.

So I went up with Tammy and we were in her room about ten minutes, we ordered pizza, and after ten minutes we were in the room a knock on the door comes and I hear Mr. Manobianco's voice say, hey Larry, is Larry Rosano in there?

Tammy says, yes he is.

She opens up the door.

With that Mr. Manobianco says to me, Larry, you know you're not supposed to be in here, what are you doing, come on, I says well, at that time I said that's your opinion. He said come on, he steps into the room, grabs my arm, says come on, come on with me. I said wait a minute, get your hands off of me, I said I'll go, just get your hands off of me.

I walked down the hall, down the steps, past the resident desk, out to the parking lot. It was pitch black. There was no lights in the back of the dorm, as opposed to the front which was well-lit.

* * *

(66) Q. Have you since obtained those records? A. Yes.

MR. BRODERICK: Your Honor, can we offer them in evidence at a later time? We don't have them here in court. I'll take it up at a later time.

Q. How long were you in the hospital? A. I'd say about two hours.

Q. You said he took x-rays? A. At least one x-ray, yes.

Q. Did they find anything wrong, any broken bones?

MR. VARVARO: Objection. This has been asked and answered.

THE COURT: I'll sustain the objection.

Q. Now, did there ever come a time when you had another incident at Adelphi University: A. Yes.

Q. When was that? A. August 26, 1986.

Q. By the way, before we get to that, were you later—did you later go to court on this first incident? Were you charged with trespass? A. Yes.

Q. You were charged with trespass but Manobianco was not charged with assault, correct? A. No.

* * *

(67) MS. SCHUSTER: Objection.

THE COURT: I'll sustain the objection.

Q. You went to trial in 1992 on this very same case? A. Yes.

Q. Your were convicted of trespass? A. yes.

Q. To your knowledge, have any charges ever been leveled against Mr. Manobianco?

MR. VARVARO: Objection.

MS. SCHUSTER: Objection.

THE COURT: Sustained.

Q. Have you ever been called as a witness against Manobianco?

MR. VARVARO: Objection.

MS. SCHUSTER: Objection.

THE COURT: Sustained.

Q. All right.

Another incident happened on August—tell us what happened, the second incident? A. On August 26, 1986 I went to the university to register for a photography course. I parked the car, talked to some students and I registered. At the end of registration you go to get your decal in the room in the university center near a stairwell. I went there on line and when I got to the woman who processes the decals she notices my name, Rosano and she

* * *

(71) they wanted to do.

THE COURT: I'll sustain the objection to the characterization.

Q. Just tell us what happened. Don't tell us what they were thinking. Just tell us what happened? A. All right. From there I was driven to the Garden City police station.

THE COURT: By whom? By the Garden City police.

Q. Did you ever seek medical care as a result of that incident?

A. I did.

Q. Where did you seek it? A. By Franklin General hospital about a day later. I also when I went to the station sergeant begin heart was there, and after the whole processing, my body was all wobbly and I said officer, please, can you call, just call somebody to bring me to the hospital. He said—this time he looks at me and he says you look all right. Go ahead, get out of here. Get out of here and he like threw me out. I had to call car service and what not.

Q. Did a third incident happen in May of 1987? A. It did.

Q. Tell us about that? A. On May 3rd, 1987, I was going to attend mass at Adelphi University, it's like an afternoon, like I guess around 12,

* * *

(74) MS. SCHUSTER: Objection.

THE COURT: Overruled.

Q. How long was this? A. About three minutes. Then there came a point where they took me, this time they just raised me, they had five officers, they raised me, they spread my legs, one officer on one leg, another officer on another leg. They just carried me. There was like twelve to fifteen students in the cafeteria at that time. They took me out and drove me to the station.

Q. Did another incident happen about a year later? A. yes.

Q. What was the date of that, if you know? A. May 4, 1988.

Q. By the way, were you later taken to court on this thing that you just told us about? Were you convicted of trespass? A. yes.

Q. Were any charges leveled against anybody else?

MR. VARVARO: Objection.

MS. SCHUSTER: Objection.

THE COURT: Sustained.

Q. Tell us about May 4, 1988? A. May 4, 1988, I came to drive a coed Linda Todesco to school and to pay a small debt that my friend had incurred. I went to campus —

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

LAWRENCE R. ROSANO,

Plaintiff,

-against-

CV 87-0876 (RR)

MEMORANDUM AND ORDER

ADELPHI UNIVERSITY; JOSEPH CRAFA, Dean of Students of Adelphi University; NICHOLAS MANOBIANCO, Adelphi University Security; HENRY WILSON; INC. VILLAGE OF GARDEN CITY; GARDEN CITY POLICE; COUNTY OF NASSAU; NASSAU COUNTY POLICE; OFFICER TED SIGWART, Badge No. 108, of Garden City; OFFICER WAYNE VOGEL, Badge No. 117, of Garden City; OFFICER K. JACKSON, Badge No. 150, of Garden City; OFFICER G. BECKET, Badge No. 104, of Garden City; OFFICER SCHROEDER, Badge No. 154, of Garden City; SGT. SULLIVAN, Badge No. 33, of Garden City; CAPT. GINHARDT of Garden City; OFFICER DiPAULO, Badge No. 37, of Garden City; OFFICER THORN, Badge No. 106, of Garden City; OFFICER VINCENT PANTOLILLO, Badge No. 139, of Garden City;

OFFICER FITZPATRICK, Badge No. 32, of Garden City; UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; UNITED STATES MERIT SYSTEMS PROTECTION BOARD; UNITED STATES OF AMERICA; NASSAU COUNTY OFFICE OF DISTRICT ATTORNEY; DENIS DILLON, District Attorney of Nassau County; MARGARET HURST, Asst. District Attorney of Nassau County; JOY WATSON, Asst. District Attorney of Nassau County; JUDGE GEOFFREY O'CONNELL of the Nassau County District Court; JUDGE JEROME MEDOWAR of the Nassau County District Court; JUDGE MARK MOGIL of the Nassau County District Court; and DISTRICT COURT OF NASSAU COUNTY, FIRST DISTRICT,

Defendants.

----------x

APPEARANCES:

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By: Michael A. Santo, Esq.
Deputy County Attorney

RAGGI, District Judge:

On March 24, 1988, Magistrate David F. Jordan submitted to this court his detailed Report and Recommendation on motions to dismiss made by various of the defendants in this case. Specifically, Magistrate Jordan recommends complete dismissal of the action as to all federal and state defendants and partial dismissal against the Village of Garden City and Adelphi

University defendants. The magistrate recommends that the court, on its own motion, dismiss the action as to the district attorney defendants and require plaintiff to file another amended complaint separately stating for each remaining defendant the claim raised, factual basis therefor and jurisdictional premise. He further recommends that this court impose sanctions against plaintiff pursuant to Rule 11 of the Federal Rules of Civil Procedure for filing his claim against the federal defendants, and assess against him the costs and attorneys' fees of the Garden City defendants insofar as they have succeeded in obtaining dismissal of the federal claim against them.

Plaintiff Lawrence Rosano, who appears pro se, on April 14, 1988, requested an extension of time to file objections pending the conclusion of a criminal trespass action against him in state court in connection with his allegedly unlawful entry onto the Queens campus of St. John's University. People v. Rosano, No. 8Q007629 (Crim. Ct., Queens County). This request was denied in an order dated April 23, 1988, which granted plaintiff ten days therefrom to file objections. Plaintiff has since filed no objections to the magistrate's report.

On April 14, 1988, Adelphi University noted as its only exception to Magistrate Jordan's report the statement at page 51 that Adelphi does not dispute the allegation that its security police used excessive force to harass plaintiff and that Garden City police ignored or covered up evidence of resulting injuries. In fact, in its Answer, Adelphi does dispute any use of excessive force. Nevertheless, because this case is before the court on motions to dismiss, the facts as pleaded in the complaint must be accepted as true.

On April 15, 1988, the Village of Garden City objected to the failure of the magistrate to hear oral argument on the motion, thereby depriving it of the opportunity to argue that plaintiff had failed to adduce evidence sufficient to establish the existence of a question of fact or to submit a statement of undisputed

material facts as required by local rule 3(g). Of course, local rule 3(g) applies to motions for summary judgment, not motions to dismiss. Plaintiff need only plead facts sufficient to support his claim to survive such a motion; he need not adduce facts in support thereof.

As to plaintiff's pendent claims, Garden City objected to the magistrate's failure to consider plaintiff's non-compliance with state law requiring a timely notice of claim. Garden City further contends that its police were not involved in any arrest of the plaintiff on May 1, 1987, as suggested in the Report. Because the court hereby dismisses all claims against these defendants, it need not resolve these particular objections.

STATEMENT OF FACTS

The motions presently pending before this court seek dismissal pursuant to Rule 12 of the Federal Rules of Civil Procedure. Accordingly, all facts as alleged in the complaint are presumed true. See Ad hoc Comm. of the Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College, 835 F.2d 980, 982 (2d Cir. 1987); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). The court adopts Magistrate Jordan's statement of facts condensed from plaintiff's 320-paragraph, 85-page amended complaint of July 31, 1987, and its 276 pages of exhibits incorporated therein.

DISCUSSION

I. Federal Defendants

For substantially the reasons stated by the magistrate, the court dismisses plaintiff's claim against the United States of America, United States Office of Personnel Management and United States Merit Systems Protection Board. The court declines, however, to impose sanctions under Rule 11.

A pro se litigant's signature on a complaint

> constitutes a certificate by the signer that the signer has read the pleading . . . ; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civil. P. 11. The standard of review under Rule 11 is an objective one. Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253-54 (2d Cir. 1985), cert. denied, 108 S. Ct. 269 (1987). Of course, since plaintiff proceeds pro se, the court must consider whether an average litigant could form a requisite reasonable belief as to the validity of his claim. Cf. id. at 254 (when attorney signs paper, objective standard involves assessment of conduct in light of what could be expected of "competent attorney"). Of course, all doubts are to be resolved in favor of the signing party, see Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 107 S. Ct. 1373 (1987), and sanctions limited to those cases where it is "patently clear that a claim has absolutely no chance of success," Eastway Constr. Corp. v. City of N.Y., 762 F.2d at 254.

In this case, the court cannot say that an average pro se litigant, as opposed to a member of the bar, could be expected to know the law with respect to claim and issue preclusion or standing that warrants dismissal of this claim against the federal defendants. Accordingly, the court declines to award sanctions.

It does, however, caution plaintiff to consider carefully the reasons for this dismissal lest any further attempt to litigate these same claims result in an award under Rule 11.

II. State Defendants

For substantially the reasons stated by the magistrate, the court dismisses plaintiff's claim against the District Court of

Nassau County, First District, and three members of its bench, Judges O'Connell, Medowar and Mogil.

III. Village of Garden City

For substantially the reasons stated by the magistrate, the court dismisses plaintiff's federal claim against the Village of Garden City, also sued herein as the "Garden City Police." Because, as Magistrate Jordan noted, plaintiff does not specifically allege that the actions complained of by discrete Garden City police officers were pursuant to a particular municipal policy, as required by Monell v. Department of Social Servs. of N.Y., 436 U.S. 638 (1978); see Liffiton v. Keuker, No. 87-6158, slip op. 4251, 4256 (2d Cir. June 1, 1988), dismissal would be appropriate under any circumstances. Moreover, the court generally agrees with Magistrate Jordan's conclusion that, even if a claim of policy could be derived from a liberal reading of the complaint, plaintiff has failed to allege a cognizable violation of his First, Fourth, Fifth or Fourteenth Amendment rights.

Specifically, with respect to plaintiff's Fourth Amendment claim that Garden City police arrested him without probable cause, the court notes that Section 140.00(5) of the New York Penal Law provides that a person is free to enter premises open to the public "unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person," in which case he is subject to prosecution for trespass. See N.Y. Penal Law §§ 140.05 et seq. (McKinney 1975 & Supp. 1988). In this case, plaintiff admits in his complaint that he had been personally advised not to enter Adelphi's premises. He claims, however, that the order was not lawful insofar as it was issued without affording him a hearing as mandated by due process and, therefore, that his arrest was without probable cause. The fatal flaw in this pleading is, of course, that plaintiff has no right under the Fourteenth Amendment to require a private institution, such as

Adelphi, to afford him a hearing in the same way a public institution is required to do before depriving someone of a place in its student body. See Rendell-Baker v. Kohn, 457 U.S. 830, 837-40 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 156-57 (1978); Albert v. Carovano, No. 87-7111, slip op. 4583, 4599-603 (2d Cir. June 28, 1988) (en banc). Assuming all facts pleaded as true, there is simply no support for the claim that the six arrests on the Adelphi campus were without probable cause.

Of course, the allegations that police used excessive force in their arrest and detention of plaintiff and either denied him medical treatment or delayed in securing treatment for him may state a constitutional claim against particular officers who, although named in the complaint, have apparently not yet been served. Magistrate Jordan concluded that they did not, however, state a pattern sufficient to support an inference of municipal liability. Plaintiff having failed to plead a municipal policy in this regard and having filed no objections to the magistrate's findings, this court concurs in the magistrate's recommendation and dismisses all federal claims against the Village of Garden City and its police department.

The court, in its discretion, declines to exercise pendent jurisdiction over state claims against these defendants, United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), as recommended by the magistrate.

The court further declines to award attorneys' fees pursuant to 42 U.S.C. § 1988. Despite the order of dismissal, this court does not find plaintiff's claims against Garden City so "frivolous, unreasonable, or without foundation" as to justify a fee award against him. Hughes v. Rowe, 449 U.S. 5, 14 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

IV. Adelphi Defendants

For substantially the reasons stated by the magistrate, this court dismisses all federal claims against Adelphi University,

Dean Joseph Crafa and Nicholas Manobianco, with the exception of that charging a conspiracy among Adelphi Security personnel and Garden City Police to use excessive force in effecting his arrests. This claim can be pursued against Adelphi University and Mr. Manobianco.

V. Prosecutorial Immunity

Magistrate Jordan recommends that this court, on its own motion, dismiss plaintiff's claims against the Nassau County District Attorney's Office, District Attorney Denis Dillon and Assistant District Attorneys Margaret Hurst and Joy Watson, on the ground that they are covered by prosecutorial immunity.

Prosecutors are absolutely immune from suit for conduct "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430 (1976). In performing investigative or administrative tasks, however, they enjoy only qualified immunity, Liffiton v. Keuker, No. 87-6158, slip op. at 4255.

The facts alleged with respect to the district attorney defendants in this case all concern plaintiff's prosecution for criminal trespass and, therefore, warrant a finding of absolute immunity. Plaintiff having received notice of this recommendation and filed no objections, see Perez v. Ortiz, No. 88-7002, slip op. 4481, 4489-90 (2d Cir. June 27, 1988) (plaintiff must have notice before court sua sponte dismisses complaint), the court dismisses plaintiff's claims against the district attorney defendants.

VI. Amended Complaint

Plaintiff is directed to file within thirty days of this order an amended complaint in conformity with the rulings made in this order, separately stating each claim pursued against each remaining defendant, as well as the jurisdictional and factual basis for the claim. To the extent defendant sues Nassau County, he is directed to articulate in his complaint what standing he has to bring suit.

CONCLUSION

The Clerk of the Court is directed to note the dismissal of this action against the United States of America, the United States Office of Personnel Management, the United States Merit Systems Protection Board, the District Court of Nassau County, First District, Judges O'Connell, Medowar and Mogil, the Village of Garden City, the Garden City Police, the Nassau County District Attorney's Office, Denis Dillon, Margaret Hurst and Joy Watson. This action is dismissed against Adelphi University, Dean Joseph Crafa and Nicholas Manobianco, with plaintiff granted leave to replead his claim for excessive force against the University and Mr. Manobianco.

Any amended complaint is to be filed within thirty (30) days of this order.

SO ORDERED.

Dated: Uniondale, New York
August 4, 1988

s/Reena Raggi
REENA RAGGI
UNITED STATES DISTRICT JUDGE

APPENDIX D

FEB. 1992 TERM

Present Hon. ANDREW J. DI PAOLA PRESIDING JUSTICE
" " PATRICIA D. COLLINS ASSOCIATE JUSTICE
" " ANGELO J. INGRASSIA ASSOCIATE JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT

-against-

LAWRENCE R. ROSANO

APPELLANT

The above named appellant having appealed to this court from JUDGMENTS OF CONVICTION of the DISTRICT COURT, NASSAU COUNTY rendered on 7-1-91 after a trial convicting him of violating PL 140.10 (7 counts) and sentencing him to total fines of $2450, probation and sixty days home detention on all counts;

and the appeal having been argued by A. LAWRENCW WASHBURN, ESQ. for the appellant and argued by MARGARET E. MAINUSCH, ESQ. for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction are unanimously modified on the law by reducing same to

trespass (Penal Law § 140.05) and remanding matters to court below for sentencing.

A. LAWRENCE WASHBURN, ESQ.
405 WEST 23rd ST., 12C
NEW YORK, N.Y. 10011

DISTRICT ATTORNEY, NASSAU CO.
APPEALS BUREAU
262 OLD COUNTRY ROAD
MINEOLA, N.Y.

s/JOHN A. CAHILL
CHIEF CLERK
APPELLATE TERM

0882g (3842T)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: 9th and 10th JUDICIAL DISTRICTS

PRESENT: DiPAOLA, P.J., COLLINS AND INGRASSIA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

LAWRENCE R. ROSANO,
Appellant.

NO. 92-6051 N
DECIDED

MAR 29 1993

Appeal by defendant from judgments of the District Court, Nassau County (Feurstein, J., nonjury trial; Warshawsky, J., order) convicting him of seven charges of criminal trespass in the third degree (Penal Law § 140.10) and imposing sentences.

Judgments of conviction unanimously modified on the law by reducing same to trespass (Penal Law § 140.05) and remanding matters to court below for sentencing.

Upon the record before us, defendant was not accepted for admission to Adelphi University as a student with the attendant scrutiny of his application and expense, but was at one point, merely an invitee auditing a course as a "guest scholar." Thus, in our opinion. he was not entitled to a formal hearing before being directed to stay away from the campus for disciplinary reasons. The administrators of a college have "broad power and great flexibility in maintaining order and securing the safety of others on the school campus..." (People v. Leonard, 62 NY2d 404, 410).

The charges of which defendant was convicted, on the other hand, are reduced to the lesser included offense of trespass, in the absence of sufficient evidence that the campus was designed to exclude intruders (Penal Law § 140.10; People v. Branciforte, NYLJ, Dec. 15, 1992 [App Term, 9th & 10th Jud Dists]). Defendant must be resentenced since trespass is a violation for which the present sentences would be illegal (Penal Law §§ 65.00, 80.05).

The other issues raised herein are lacking in merit.

All concur.

(stamp)

Appendix E

(271) Manobianco/direct/Varvaro

THE COURT: All right.

Q. Mr. Manobianco, directing your attention to May 1st, 1986, did Mr. Rosano return to campus that day? A. Yes, he did.

Q. Do you recall where you were when you first learned about Mr. Rosano being on campus? A. Yes. I was in the security booth on campus at about 9:30 at night.

Q. What happened, what did you do after you learned Mr. Rosano was on the campus, how did you learn that he was on campus? A. We had received, or the dispatcher, the security dispatcher, had received a telephone call from one of the dormitories that Mr. Rosano was in the building and he was up in a specific room visiting a specific person.

Q. What did you do after you learned that? A. I said, I'll be right down. And Sergeant Henry Wilson was in the office there.

Q. And Henry Wilson works for the security department? A. Yes, he's a supervisor. He's a sergeant.

Q. So did you and Mr. Wilson go? A. He and I went down to the dormitory, which was Chapman Dormitory. We spoke to the RA, who is the resident aide thereat, who said that Mr. Rosano was in room whatever. And we went up to the room and I knocked on the door.

(272) Q. What happened after you knocked on the door? A. Miss Fishman, I believe that was her name, Miss Fishman came to the door. And I said, is Larry Rosano in there? She said, yes.

Q. What happened next? A. I said, would you please tell him to come out? Larry showed up at the front door. I said, Larry, you shouldn't be here. You're under arrest once again.

Q. Now, what happened next? A. He got his belongings, whatever he had, and he said, okay, and he walked out with us, very calm and peaceful like.

We go downstairs to the rear door of the building. I went through the door first, he between myself and Sergeant Wilson.

As we got out the door, he pushed me forward, knocking me down, pushed Henry out of the way, Sergeant Wilson, pushed him out of the way, and ran off into the parking lot.

Q. What did you do next? A. I pursued him, caught up with him, we wrestled to the ground. We bounced off a few cars. I ripped my pants, injured my knee, not to the extent that I needed any care.

We were able to put the handcuffs on him, put him in the security vehicle, and drive directly to the security booth. And thereat, about two minutes, thereat, the Garden (273) City Police Department showed up in about two minutes.

Q. What happened when the Garden City police officers showed up at the campus? A. We removed the handcuffs from him, being they were ours, and they applied their own handcuffs, and they took him off to the Garden City station house.

Q. Mr. Manobianco, you were in the courtroom yesterday when the plaintiff testified, correct? A. Yes.

Q. Did you and Mr. Wilson kick the plaintiff twelve times during the approximately two-minute interval on that date? A. Absolutely not.

Q. Did you squeeze a chain that was around the plaintiff's neck on that date, and squeeze the chain around his neck? A. Absolutely not.

Q. Did you punch him in the nose that day? A. No, sir, I did not.

Q. Now, when the plaintiff, you said earlier, pushed you and Mr. Wilson aside and ran, on that date, at that point, were you aware of the prior complaint that you were shown earlier? A. Yes, I was.

Q. That complaint was given to you before this date, correct? A. Yes.

Q. And it was significant to you in how you thought that you (274) were going to handle the plaintiff?

MR. BRODERICK: Objection.

THE COURT: I'll sustain the objection to the form of the question.

Q. Incidentally, Mr. Manobianco, May 1st, '86, that was not the first time that Mr. Rosano was arrested on campus, correct? A. I don't believe so.

Q. Do you recall there being two other occasions on August 26, '86 and April 21, '87? A. I believe there was.

Q. Mr. Manobianco, directing your attention to August 26, 1986, did there come a time on that date when you encountered the plaintiff? A. Yes, I did.

Q. Do you remember where that occurred? A. Yes. It was the University Center, room 106, on the first floor.

Q. What is University Center? A. University Center that day was being used for the student registration for the—I believe the fall term, springtime.

Q. Just so we know, students registering for classes, correct? A. Yes.

Q. And did there come a time that date when you learned that (275) Mr. Rosano was on campus? A. Yes.

Q. How did you learn that? A. Mr. Rosano had attempted to cure a—

MR. BRODERICK: Objection, your Honor. He obviously doesn't have personal knowledge of this. It's hearsay.

MR. VARVARO: Let's find out. Let's find out if he knows.

THE COURT: This is information known to him, I take it, that affected subsequent decisions that he made. It isn't being offered for the truth, but to explain his actions, so I'll overrule the objection.

Q. Would you tell us? A. Yes. Room 106 was being used by my office specifically for the purposes of issuing I.D.'s for the

new semester, and also giving out decals for parking permits on campus.

The woman who was taking the I.D.'s recognized Mr. Rosano and knew of him, and called my office indicating that he was there, attempting to get an I.D.

Q. What did you do after you— A. I responded with my associate Edward Miller, along with security officer Garland Mercer.

We went to room 106, asked Mr. Rosano to step outside. And outside the office 106 is a hallway, stairway, and we put Mr. Rosano in the hallway.

(276) Q. What is the reason that you asked Mr. Rosano to go with you to the hallway? A. Because Mr. Rosano was making a big to-do in front of many, many students, and we did not want to escalate the situation, which would get out of hand very quickly with Mr. Rosano.

Q. Did you ask him to go out into the hallway so you and the other officers could beat him up? A. That's not true at all.

Q. What happened next? A. I told Mr. Rosano that he was, once again, under arrest, and he had no right to be there. At that point, he bolts away from us, and wants to make every effort to get away.

We now restrained him from removing himself from that area, and placed the handcuffs on him.

Q. What happened after you placed the cuffs on him? A. A call was made to the Garden City Police Department even prior to this, because we know we were going to arrest him.

Q. You mean the call was made before? A. To the Garden City Police Department, to respond to the rear of the University Center, which would be the loading platform in back of the kitchen area. This room, this hallway, staircase area, has a doorway leading directly out to that platform area.

Q. How much time passed from the time that you put the cuffs (277) on him until the police arrived, approximately? A. Six minutes, seven minutes.

Q. What happened when the police arrived? A. They took custody of him, and that was the end of it.

Q. Did they give you your cuffs back? A. Yes.

Q. Did you and any other Adelphi officer on that date, August 26, '86, put the plaintiff's two ankles on top of one another and step on them, as he demonstrated on the floor yesterday? Did you do that? A. No. This is the first time that I've ever seen that.

Q. Did you see another officer do that that day? A. Absolutely not.

Q. Directing your attention, sir, to May 4, 1988. Were you involved in arresting the plaintiff on that date, if you recall? A. I don't recall. Is there something that could refresh my recollection with that? Is there an incident or complaint form?

Q. Let me ask you this. Was there a time in May of 1988 that you went to the Garden City police station and asked an officer, Sergeant Chester to arrest Mr. Rosano on a return date? A. No, sir, I did not.

Q. Are you aware of any Adelphi security officer who did any

* * *

Appendix F

(495) D'Alessandro/cross/Broderick

MS. SCHUSTER: I object to the form of the question.

THE COURT: I take it you're not going to say in his opinion was he telling the truth?

MR. BRODERICK: No.

(Whereupon, the following occurred in open court.)

Q. Dr. D'Alessandro, in the course of your conferences with Larry Rosano, did he tell you that he had been punched in the face by Mr. Manobianco? A. Yes, he did.

Q. Did he tell you that his ankles had been rubbed one on top of another, and a fellow jumping up on top of him?

MR. VARVARO: Objection to the form.

THE COURT: Ladies and gentlemen, this isn't being offered for the truth that these things in fact happened. This is just being offered to show the basis of the witness' knowledge and his questions about perception. It's not being offered for the fact of — the truth of any of this.

Q. Did he tell you that his hands had been handcuffed behind his back and then lifted in a painful way? A. Yes, he did.

Q. Did he tell you on another occasion that he had been kicked and one ankle had been put across another and then someone stepping on top of the other ankle? A. Yes.

Q. Can you tell us with a reasonable degree of medical

* * *

Appendix G

(513) the evidence that the plaintiff has submitted, raising an issue f fact of conspiracy, we submit that would suffice to submit an issue of fact to the jury with regard to our third-party complaint.

THE COURT: But they've already said and conceded that they don't have a Monell case against the Village of Garden City. You didn't implead various police officers.

Their conspiracy claim, as I understand it, is that there was a conspiracy between members of the Adelphi police security and members of the Garden City Police Department. You impleaded the Village of Garden City. How do you implead the Village of Garden City as opposed to individual police officers? I don't understand how they're in the case.

If the plaintiff isn't alleging that they're in the case on the Monell theory, how are they in?

MR. VARVARO: Your Honor, just let the record sit as it is, and we'll take the court's decision on the third-party defendant's motion.

THE COURT: I'm dismissing the third-party defendant.

MR. VARVARO: At this time, we'd like to renew our motion for a directed verdict, in this case, the plaintiff's case against the defendants.

First, with regard to Adelphi, we submit that they ought to be let out of this case. In 1983 cases, there is no

* * *

(516) initial statement, but we would submit that the case against Adelphi ought to be dismissed because of the lack of color of state law under the Hernandez case, and secondly, because there is no respondeat superior, as outlined in the Powell case. So the case against that defendant ought to be dismissed.

THE COURT: Let me ask, just before we proceed past this: Mr. Washburn, are you contending here—or, apart from contending, was there any allegation that Adelphi was in here based upon some policy they had of using excessive force, on similar language in Monell; was that alleged?

MR. WASHBURN: No, your Honor.

THE COURT: Has it been proven?

MR. WASHBURN: I certainly don't think it's been proven. We made no effort to prove it.

THE COURT: Under what theory is Adelphi University held? I'm not talking about Mr. Manobianco now, I'm talking about Adelphi University. Under what theory are we holding the university in this case?

MR. WASHBURN: Vicarious liability, respondeat superior.

THE COURT: Let me read to you a decision of the Second Circuit, and ask you if you're still of that view, that that's a legal basis.

This was a case in which Alexander's department store

* * *

(520) THE COURT: No. Not from other circuits. a whole series of cases. You ought to familiarize yourself with it.

MR. WASHBURN: Yes, it may be that we'll have to dismiss Adelphi University.

MR. VARVARO: The decision that I cited was a 1984 case, the Powell case.

MR. WASHBURN: I'll look at your case, also.

THE COURT: That would leave us with Mr. Manobianco.

MR. VARVARO: And we renew our motion to dismiss the conspiracy claim against Mr. Manobianco.

Your Honor, the only evidence on this record pertaining to Mr. Manobianco is the plaintiff's claim regarding Mr. Manobianco on May 1st, 1986, the incident at Tammy Fishman's room. And August 26, 1986, that was the incident

regarding plaintiff's attempt to register at Adelphi. Your Honor—

THE COURT: Wait a minute. Are they the only two ones he's discussed?

MR. VARVARO: Where he discussed Mr. Manobianco, yes.

THE COURT: Is that right?

MR. WASHBURN: I believe those are the only two in which he personally participated.

* * *

Appendix H

(548) not sure that I know enough to have a determination as to whether he's a policymaker, and it's your burden to show that, isn't it?

MR. WASHBURN: I think it's the plaintiff's burden, yes, no question about that.

THE COURT: What do I know? How can I decide on this record?

MR. WASHBURN: There's testimony in the record that he was the director of security for the entire university, that he has some, I forget whether it's fifteen or twenty-four men under him.

THE COURT: Is that it? Is there anything else other than that?

MR. WASHBURN: I think that's clearly analogous under Pembauer to the sheriff of the county or the chief of the city. He's the chief of the university on security.

I don't think there's any question, just like the warden of the Allegheny County jail, that he has the power to administer that end of the university business. I do think that taking it away from the jury would be a mistake, because I think —

THE COURT: But the issue of whether he's a policymaker doesn't go to the jury. I have to decide that now.

The instructions, basically, along these lines —

* * *

(559) You're dealing with a lawyer who is presented with an issue and had to argue it, that's all. There may be no practical point to it.

THE COURT: I don't think there's a practical point to it.

I think I have to make the determination as to whether he's the policymaker.

I don't think that that has been presented to me in a way that I can make that determination.

It's not in the record of this case.

Apparently there's nothing in depositions or anything that is going to enlighten it. I just wonder. If between now and tomorrow morning, you wanted to present anything to me, fine.

MR. WASHBURN: I don't think that I would do that, your Honor.

THE COURT: I'll give you the opportunity.

MR. WASHBURN: In developing the argument before you, it has occurred to me, as I have already stated, that Mr. Nicholas Manobianco testified really on both sides of the scales. One is that he's director of security.

The other is, if he was guilty of the acts alleged, he'd be violating the rules of the department.

THE COURT: All right.

I'll just submit this case to the jury on the

* * *

Appendix I

(568) position of retrying the entire case. So that's the reason that I ask that question.

Mr. Washburn, is there any objection from your perspective?

MR. WASHBURN: Not from mine, that's why I like special verdicts.

THE COURT: Mr. Varvaro.

MR. VARVARO: No objection.

MR. BRODERICK: Your Honor, I have a question to be clarified for my summation. In my opening statement I alleged there were four or five different instances of assaults on my client. Are two of them out of the case now, the last two? Or can I talk about all of them.

THE COURT: That's the question that I asked all of you and I thought that the understanding was we were talking about the May 1st and August 26th. That's what I understood. That doesn't necessarily mean that the other incidents might not have relevance in terms of showing the existence of a conspiracy. But as I understood it, because I asked that question yesterday, that the reference was to those two incidents and there wasn't an objection. That's how I did the jury instructions. That's not to say that you couldn't argue that those other incidents are relevant on whether there existed a conspiracy or not.

MR. BRODERICK: Yes. Good.

* * *

No. 96-1822

(3)

Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LAWRENCE R. ROSANO,

Petitioner,

—v.—

ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANO, and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NANCY CIFONE
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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DECISION BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit, dated November 25, 1996, which affirmed a jury verdict in favor of the defendant Nicholas Manobianco, and dismissal of the action as to defendants Adelphi University and Village of Garden City, is set forth in Appendix A of the Petition. Accordingly, defendant-respondent Village of Garden City respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

The only issue raised in the Petition as it relates to third party defendant-respondent Village of Garden City (also sued herein as the Garden City Police) (hereinafter collectively referred to as "Garden City") appears to be whether Garden City's attorney's question at trial was sufficiently prejudicial to warrant a new trial. To begin with, Petitioner's claim of prejudice was not preserved by Petitioner's trial counsel below. The so-called "prejudicial" question, in its restated form, was not objected to by counsel at the trial, nor was the handling of this matter by the Trial Court.

By way of background, this lawsuit, initiated more than ten years ago, involves Petitioner's claims arising from his arrests and subsequent conviction for criminal trespass for entering the Adelphi University campus in violation of the terms of a *persona non grata* letter that had been issued to plaintiff by Adelphi University. (Petitioner's Appendix A-4). Initially, the suit involved at least thirty defendants. Over the years, however, as a result of various orders and recommendations, only three defendants remained: defendants Adelphi University and Nicholas Manobianco and third-party defendant, Village of Garden City.

Indeed, by Memorandum and Order dated August 4, 1988, the Honorable Reena Raggi, substantially adopting a March 24, 1988 Report and Recommendation of Magistrate David F. Jordan (Respondents Adelphi and Manobianco's Appendix A (1a - 39a) and Appendix C (49a - 58a)), dismissed all claims against defendants Garden City, Adelphi University, Nicholas Manobianco and Dean Joseph Crafa, among others, but granted plaintiff leave to replead his claim for excessive force against Adelphi University and Mr. Manobianco. Plaintiff, alleging violations under 42 U.S.C. § 1983, claimed that defendant Nicholas Manobianco, then Chief of the Adelphi University security force, conspired with members of the Village of Garden City Police Department to use excessive force

upon the plaintiff when he was arrested for trespass at Adelphi. Garden City had subsequently been brought into the case by Adelphi University as a third-party defendant.

In December 1993, the case was tried to a jury. At the trial, petitioner's treating psychologist, Dr. D'Alessandro, was called by defendant-respondent Adelphi, without objection. It was elicited during cross-examination that Petitioner reported to Dr. D'Alessandro two unusual but similar type beatings. (Respondents Adelphi and Manobianco's Appendix F (67a)). During Garden City's attorney's cross-examination of Dr. D'Alessandro, she asked the witness the following question:

> Q. Did [Rosano] ever tell you that some time prior to that, that he had been assaulted by a correction officer in East Meadow, that he had been placed on the floor, and that his ankles had been put together, and that he had been jumped up and down on by correctional officers in East Meadow?

(Petitioner's Appendix A-30 - A-31). Plaintiff's counsel immediately objected, the question was not answered by the witness and a sidebar was conducted. (Petitioner's Appendix A-30 - A-31). The trial court struck the question, and without objection, allowed Garden City's trial counsel to address the issue in a rephrased question that would not reveal that petitioner had been incarcerated. Garden City's counsel rephrased the question as follows:

> Q. At any time during your course of treatment of Mr. Rosano, did he ever tell you that any police authorities other than Garden City or the Adelphi security forces had ever treated him in—had ever treated him in a manner such as he described to you as he had been treated by the Adelphi and Garden City police officers?

(Petitioner's Appendix A-32). This time, there was no objection by plaintiff's counsel. (Petitioner's Appendix A-32 - A-33).

Moreover, as Judge Amon states in her April 5, 1995 Memorandum and Order, the jury was instructed twice by the Court that the question was not evidence. (Petitioner's Appendix A-26). Judge Amon also instructed the jury, as part of the Court's charge, that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." (Petitioner's Appendix A-26). In addition, the Court instructed the witness that in responding to counsel's question he should not indicate "the circumstances of where it happened. Just if you can tell us what he told you." (Petitioner's Appendix A-33). The witness followed the Court's instruction and did not refer to Petitioner's incarceration in his response. (Petitioner's Appendix A-33).

In her April 5, 1995 Memorandum and Order, Judge Amon also noted Garden City's counsel's explanation that her question was not intended to deliberately violate the Court's pretrial evidentiary ruling. Garden City's counsel explained that it was her understanding that the Court's ruling referred only to plaintiff's most recent incarceration and not to the incident to which she was referring, which occurred in February or March 1991. (Petitioner's Appendix A-27).

Finally, Judge Amon found that Garden City's counsel's "question in its restated form was not improper in that it did not make any reference to plaintiff's subsequent periods of incarceration." The Court opined:

> The inquiry was also relevant. Plaintiff had described a very unusual form of abuse [footnote: Plaintiff testified that while he was pinned to the ground, the security guards put his ankles together and began 'jumping on [him] like a trampoline.'] and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police.

(Petitioner's Appendix A-27 - A-28).

Prior to the case having been given to the jury, the trial court dismissed plaintiff's claims against defendants Adelphi

University and Garden City. (Petitioner's Appendix A-4 - A-5). On December 16, 1993, the jury returned a verdict in favor of the only remaining defendant, Nicholas Manobianco. (Petitioner's Appendix A-5).

By Memorandum and Order dated June 28, 1994, Judge Amon denied plaintiff's claim for a new trial pursuant to Rule 59 (a)(1) on various grounds. (Petitioner's Appendix A-16 - A-21). Judge Amon's April 5, 1995 Memorandum and Order, dealt with plaintiff's only remaining claim for post-trial relief, namely, that a question posed by Garden City's trial attorney violated an instruction by the trial court and was sufficiently prejudicial to warrant a new trial. Judge Amon concluded that Garden City's attorney's question did not warrant a new trial. (Petitioner's Appendix A-22 - A-29).

The judgment of the United States District Court for the Eastern District of New York and the denial of petitioner's Rule 59 motions were affirmed by the United States Court of Appeals for the Second Circuit. (Petitioner's Appendix A-1 - A-6).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

POINT I

GARDEN CITY'S ATTORNEY'S QUESTION WAS NOT SUFFICIENTLY PREJUDICIAL TO WARRANT A NEW TRIAL

The case law is clear, and this Court has held, that a new trial will not be granted unless the Court " 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 875 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

This Court's observation in *Smith v. Lightning Bolt Productions, Inc.*, with respect to an improper question posed by plaintiff's counsel, is instructive:

> Plainly this question was improper, but the Court acted promptly to minimize any damage from it. It immediately struck the question, even before defense counsel could voice an objection, and it cautioned the jury to disregard the question. There was no further mention of the subject within the hearing of the jury. The trial judge was in the best position to assess the effect of the matter on the jury, and we can see no basis for overturning his view that this limited breach did not warrant a new trial.

Smith v. Lightning Bolt Productions, Inc., 861 F.2d at 370.

Similarly, in the instant case, upon the question having been objected to by plaintiff's counsel, after a sidebar, the question was stricken by Judge Amon. (Petitioner's Appendix A-30 - A-31). Further, Garden City's counsel was instructed to rephrase the question in a way that would not reveal that plaintiff had been incarcerated. (Petitioner's Appendix A-32). Moreover, the witness was instructed to limit his answer to what he was told, and the jury was instructed twice by the Court that the question was not evidence. (Petitioner's Appendix A-26 & A-33). Judge Amon also charged the jury that "[a]ny evidence ordered stricken by the Court must be entirely disregarded by you in your deliberations." (Petitioner's Appendix A-26).

Clearly, the Court took all the necessary precautions to protect plaintiff from any prejudice that may conceivably have resulted from counsel's question. Hence, as Judge Amon concluded in her April 5, 1995 Memorandum and Order, "the initial question posed by counsel for Garden City does not rise to the level of prejudice necessary to justify the granting of a new trial." (Petitioner's Appendix A-26).

Moreover, Judge Amon found that counsel's question in its restated form was not improper "in that it did not make any reference to plaintiff's subsequent periods of incarceration" and "[t]he inquiry was also relevant," since plaintiff had described a very unusual form of abuse "and it was relevant to his credibility that he had made an accusation of the same unusual conduct against a different group of police." (Petitioner's Appendix A-27 - A-28).

Furthermore, plaintiff's counsel did not object to Garden City's counsel's question in its restated form. (Petitioner's Appendix A-32 - A-33). As Judge Amon observed in her April 5, 1995 Memorandum and Order, "[a]bsent plain error, a party's failure to object to the admission of evidence at trial precludes the party from raising the argument on appeal." (citing Fed. R. Evid. 103; *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991)). (Petitioner's Appendix A-28).

Indeed, in light of the foregoing, the Court of Appeals for the Second Circuit aptly concluded that "[a]lthough an improper question was asked, the district court minimized the prejudicial effect of the question by immediately ordering the question struck from the record. Thus, the challenged statement does not provide a basis for disturbing the jury verdict." (citing *Smith v. Lightening Bolt Prod., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). (Petitioner's Appendix A-5).

Petitioner's claim that these questions by some stretch of the imagination "planted" an "idea . . . in the mind of the jury that the Petitioner was incarcerated and had made prior claims - litigiousness" is belied by the Record herein. There was no evidence that Petitioner had a non-felony criminal record, or a criminal record of any sort, or that he had made prior claims, as Petitioner contends. The fact that Petitioner told his treating psychologists that he was subjected to the same unusual conduct on another occasion merely goes to the issue of credibility. Petitioner's attempt to create prejudice where none exists, particularly where the trial court went to great

lengths to minimize the effect of the initial question, and where Petitioner's counsel did not object to the question in its restated form, simply must fail. Hence, Petitioner's writ of certiorari should be denied.

CONCLUSION

In light of the foregoing, it is clear that there was no error at trial, no prejudice to Petitioner sufficient to warrant a new trial and no properly preserved basis for Petitioner's claim herein. Petitioner has had the benefit of a full jury trial and numerous motions in this matter, while having been represented by two competent attorneys. Hence, defendant-respondent Village of Garden City, respectfully requests that this Court deny Petitioner's writ of certiorari and affirm the judgment of the Court of Appeals for the Second Circuit together with such other and further relief as this Court deems just and proper.

Dated: Valley Stream, New York
June 26, 1997

Respectfully submitted,

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No. 96-1822

In The

Supreme Court of the United States

OCTOBER TERM, 1996

LAWRENCE ROSANO,

Petitioner,

- v -

ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANCO and VILLAGE OF GARDEN CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ADELPHI UNIVERSITY, JOSEPH CRAFA, NICHOLAS MANOBIANCO and VILLAGE OF GARDEN CITY,

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. INTRODUCTION

As stated in the Petition, Petitioner Rosano is an individual personally and morally opposed to abortion, who was falsely arrested and subjected to excessive force on numerous occasions for engaging in his right to speak freely at Respondent Adelphi University. He was arrested by the Respondent Garden City Police in cooperation with Respondent Adelphi University Security and its Chief of Security, Respondent Nicholas Manobianco. The gravamen of the Petitioner's civil rights claim was a joint action conspiracy under 42 U.S.C. § 1983 between the private actors (Respondent Adelphi University and its Chief of Security,

Nicholas Manobianco) and the Garden City Police consisting of the use of excessive force during the arrest, including beating up and injuring the Petitioner on several occasions.

In his Petition, Petitioner Rosano raised three substantial legal issues for consideration by this Court: (1) highly prejudicial questioning by defense counsel regarding Petitioner's past misdemeanor criminal record and incarceration (which incarceration occurred after the events at Respondent Adelphi University and which did not involve a felony or *crimen falsi* misdemeanor conviction); (2) improper jury instructions requiring Petitioner to prove not a joint action conspiracy between the police and University, but that the University was "clothed with state authority"; and (3) whether giving the jury a copy of the written instructions should be banned in all federal district courts because of the real danger of causing the jury to focus on particular statements out of context. Instead of focusing on these three issues, Respondents Adelphi University, Dean Joseph Crafa and Security Chief Nicholas Manobianco have engaged in a wholesale attack on Petitioner's character, much as they did at trial. The Petitioner is compelled to disburse this smoke screen in this Reply.

II. THE *PERSONA NON GRATA* LETTER AND UNIVERSITY MISCONDUCT

Respondent Adelphi University has argued that the ground for its *persona non grata* letter on March 10, 1986 was Petitioner Rosano's "harassing a coed" on campus (Respondent Adelphi University's Opp., at 3). However, Respondent Adelphi never articulated that reason for exclusion in its *persona non grata* letter issued Petitioner Rosano, even though obligated to do so, as Respondent

Adelphi University was at all times during the incidents in question "open to the public", *People v. Wilson*, 469 N.Y.S.2d 905, 908 (City Ct. Rochester 1983), the absence of which renders the *persona non grata* letter unlawful, *per se*.

Respondent Adelphi University further argues that "[Petitioner] [Rosano] was not a student and therefore not entitled to a hearing on the *persona non grata* letter". (Respondent Adelphi University's Opp., at 5). To the contrary, however, Petitioner Rosano *was* a part time "student" in Respondent Adelphi University's Graduate Scholar's program, paying about $150 for that status, studying Italian II during the day session. Moreover, as an alumnus in the Respondent Adelphi University Paralegal program since 1983, he always thereafter possessed the status as a "student", according to Respondent Adelphi University regulations in force at the time of all incidents in question. As a "student", Petitioner Rosano was entitled to a hearing, *People v. Leonard*, 477 N.Y.S.2d 111, 114-115 (Ct. App. 1984) ["defendant who concededly is not a student . . . at the campus, has identified no 'property' or 'liberty' interest in being on campus grounds that he could be lawfully deprived of only after being accorded a hearing."]

Nevertheless, as an "individual", Petitioner Rosano was entitled to a hearing prior to the *persona non grata* letter being issued under federal law, which Respondent Adelphi University was required to honor as it receives federal assistance. Respondent Adelphi University was obligated to create and enforce its own reasonable regulatory scheme to protect "individuals" from violation of their due process rights. *Starishevsky v. Hofstra University*, 612 N.Y.S.2d 794, 797 (Sup. 1994) (sexual harassment); *Tedeschi v. Wagner*

College, 49 N.Y.2d 652, 660, 427 N.Y.S.2d 760, 764, 404 N.E.2d 1302 (Ct. App. 1980); *Weidemann v. State University of New York College at Cortland et al.*, 592 N.Y.S.2d 99, 100-101 (A.D.3rd Dept. 1992); *Fraad-Wolff v. Vassar College*, 932 F.Supp. 88, 91 (S.D.N.Y. 1996).

Since Petitioner Rosano had a valid license to be on campus during all arrests in question, namely, without a lawful *persona non grata* letter against him, all physical force conceded to at trial in December, 1993, becomes excessive. *Bauer v. Norris*, 713 F.2d 408, 412 (8th Cir. 1983) ["lack of provocation or need to use force would make any use of force excessive."]. Thereby, under 42 U.S.C. 1983, if the *persona non grata* letter is deemed unlawful, Petitioner Rosano wins liability against Respondent Adelphi University and Garden City Police, notwithstanding the verdict. A new trial must be granted.

III. CONCLUSION

The Court should grant the Petition for Certiorari.

Dated:
New Milford, CT.
September 16, 1997

Respectfully submitted,

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